

DAMAGE SUITS AGAINST PUBLIC OFFICERS

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I. INTRODUCTION: TANGLED THREADS

Increasingly over the past twenty years, government officials have been sued for monetary damages.¹ An array of asserted injuries (physical, financial, and emotional) attributed to a variety of legal wrongs (common law torts, violations of statutory restrictions on government action, and infringement of constitutional guarantees) by officials of all types (the President of the United States, Cabinet officers, governors, judges, prosecutors, prison wardens, school superintendents, teachers, and police officers) has confronted courts. Often without benefit of explicit legislative attention to this question, courts have been asked to determine the occasions for holding public officials answerable in damages. Under the Supreme Court's active leadership, the tests for determining when officials will be excused from liability have been altered substantially.² The formerly disparate rules for officials of various ranks and for differing claimed wrongs have been abandoned: in their place, a general rule has been fashioned for nearly all non-judicial government employees,³ granting "qualified immunity" if the official acted in good faith and if there were reasonable grounds for assuming that the acts were authorized by law.⁴

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¹ See, e.g., ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, 1979 ANNUAL REPORT OF THE DIRECTOR Table 21, at 61 (tabulating prisoner petitions filed in federal district courts during the 1970s).

² See text accompanying notes 69-106 *infra*.

³ Legislators and members of their staffs acting in a strictly legislative capacity are excepted from this general rule, retaining instead absolute immunity for such acts pursuant to the speech or debate clause of the Constitution, U.S. CONST. art. I, § 6, cl. 1 ("for any Speech or Debate in either House, [the Senators and Representatives] shall not be questioned in any other Place"), or similar provisions in state constitutions. See, e.g., *Doe v. McMillan*, 412 U.S. 306, 312-13 (1973); *Tenney v. Brandhove*, 341 U.S. 367, 372-75 (1951).

⁴ See, e.g., *Butz v. Economou*, 438 U.S. 478, 506-07 (1978); *Procunier v. Navarette*, 434 U.S. 555, 561-62 (1978); *O'Connor v. Donaldson*, 422 U.S. 563,

The change in the defense officials enjoy to actions for damage liability can be traced through the case law without great difficulty, but it must be understood against a background that the cases, without much explicit discussion, reflect. Legal doctrine and commentary that can be sorted out under five different headings come together in the official liability cases: (1) the basis for tort liability; (2) the function of government; (3) the relation of federal to state government; (4) the role of courts, and (5) the relationship among members of an enterprise. These are the threads from which the fabric of official liability decisions is woven. Changes in each of these areas have had an impact on the scope of official damage liability. Although a full explication of the interplay of these areas would require considerably lengthier treatment than is appropriate to this format, some sense of their importance to discussion of official liability can be given in relatively short compass.

Notions respecting the basis for tort liability inform discussions of officials' excuse from liability in two ways. First, tort liability or federal analogues to tort liability must (at least arguably) attach to official conduct before the question of excuse arises. The breadth or narrowness of tort liability in general, therefore, is the initial determinant of the scope of officials' liability. Second, the principles that inform discussion of tort liability—its usefulness to accomplish goals of fairness or of socially efficient allocation of resources—provide a set of tools well-suited to discussion of the desirability of official liability.

Both the scope of substantive tort liability and the principles advanced to aid analysis of tort liability have undergone a metamorphosis that has affected official liability. The decisions respecting official liability over the past 150 years reveal a slowly developing pattern of official excuse over roughly the first 100 years of that period and a less gradual process of dissatisfaction with, and alteration of, that pattern over the next half-century, with most of the actual change concentrated in the last two decades.⁵ The change in tort law and commentary fits the same general pattern, but it occurs a bit earlier, presaging the change in official liability. Thus, the evolution through the latter half of the nineteenth century of a predominantly fault-based system of tort liability—requiring a showing that harm resulted from defendant's negligence or from acts taken by defendant with the intent to harm plaintiff—was followed

577 (1975); *Wood v. Strickland*, 420 U.S. 308, 321-22 (1975); *Scheuer v. Rhodes*, 416 U.S. 232, 247-48 (1974). See also text accompanying notes 69-106 *infra*.

⁵ See text accompanying notes 36-106 *infra*.

by recognition of tort liability without overt inquiry as to fault in several broad areas.⁶ So, too, commentary on principles of tort law shifted from discussion of personal culpability⁷ to discussion concerning the social impact of liability rules,⁸ a theme that has come to dominate tort writing despite the dissenting notes sounded by Professors Epstein and Fletcher.⁹ Although fairness and distributional goals may nonetheless be pursued,¹⁰ the common ground for examination of a tort rule now is its effect on individuals' behavior. Increasingly, the mediating effect of systemic costs (the costs of formulating and applying rules) and of what might be termed "negative" liability avoidance measures¹¹ (encompassing devices, such as insurance, that spread risk and those, like "defensive medicine," that shift the burden of reducing risk) is recognized as an important factor in determining a liability rule's impact on behavior.¹²

The function performed by government also has changed over this period, and the courts' evaluation of the appropriate justifications for, and limitations on, government action have changed along with it. It is a commonplace that government activity has greatly expanded over the last fifty years. The number of government employees, the number and range of government actions,

⁶ Liability for defective products is an example. See, e.g., Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791 (1966); Prosser, *The Assault upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099 (1960). The argument advanced in Gregory, *Trespass to Negligence to Absolute Liability*, 37 VA. L. REV. 359 (1951), is that the absolute liability decisions represent not so much an evolutionary change in tort law as a recognition of alternatives to fault-based liability that always have existed in Anglo-American tort law.

⁷ E.g., O. HOLMES, *THE COMMON LAW* 77-129 (1881).

⁸ E.g., G. CALABRESI, *THE COSTS OF ACCIDENTS* (1970); Henderson, *Extending the Boundaries of Strict Products Liability: Implications of the Theory of the Second Best*, 128 U. PA. L. REV. 1036 (1980); Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29 (1972).

⁹ See Epstein, *A Theory of Strict Liability*, 2 J. LEGAL STUD. 151 (1973); Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537 (1972).

¹⁰ See G. CALABRESI, *supra* note 8; Calabresi & Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1098-101 (1972). See also W. BLUM & H. KALVEN, *PUBLIC LAW PERSPECTIVES ON A PRIVATE LAW PROBLEM* (1965) (merging deterrence and fairness analyses).

¹¹ "Positive" liability avoidance measures would be socially desirable means of reducing the harm to which liability attaches. "Negative" liability avoidance measures include all other means of reducing the likely costs of liability suits to the putative defendant.

¹² E.g., G. CALABRESI, *supra* note 8, at 250-65; R. KEETON & J. O'CONNELL, *BASIC PROTECTION FOR THE TRAFFIC VICTIM* (1965); Franklin, *Replacing the Negligence Lottery: Compensation and Selective Reimbursement*, 53 VA. L. REV. 774 (1967).

the money absorbed by government, and the proportion of the work-force and of the national product devoted to government all have increased remarkably over this period.¹³ The rise in government activity means that, regardless of the benefit conferred by governmental actors, there is increased likelihood of complaint that these actors have harmed others; hence, perhaps, there is increased pressure to provide recompense for officially inflicted injuries. With a few notable exceptions, government activity in this same period has won a presumption of validity that at least for a time it lacked. The constraints on both federal and state governmental programs imposed in the early 1800s to prevent government trespass on vested rights in property, and in the late 1800s and early 1900s to prevent interference with individuals' "right to contract," largely failed to survive the 1930s.¹⁴ A general presumption that government at some level, if not at all levels, may regulate almost any sphere of human endeavor, and may do so by almost any means, has replaced the restrictive view of the role of government reflected in cases as various as *Lochner v. New York*,¹⁵ *Schechter Poultry Corp. v. United States*,¹⁶ and *Meyer v. Nebraska*.¹⁷ If legal doc-

¹³ See, e.g., SENATE COMM. ON GOVERNMENTAL AFFAIRS, ORGANIZATION OF FEDERAL EXECUTIVE DEPARTMENTS AND AGENCIES, 95th Cong., 1st Sess. (1977) (charts showing change in federal employment); *The 1981 Budget and Regulatory Reform*, 4 REG. 7 (Mar./Apr. 1980).

¹⁴ Compare *New State Ice Co. v. Liebmann*, 285 U.S. 262 (1932); *Adkins v. Children's Hosp.*, 261 U.S. 525 (1923); *Allgeyer v. Louisiana*, 165 U.S. 578 (1897); *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518 (1819) and *Sturges v. Crowninshield*, 17 U.S. (4 Wheat.) 122 (1819) with *United States R.R. Retirement Bd. v. Fritz*, 101 S. Ct. 453 (1980); *North Dakota State Bd. of Pharmacy v. Snyder's Drug Stores, Inc.*, 414 U.S. 156 (1973); *Railway Express Agency, Inc. v. New York*, 336 U.S. 106 (1949); *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937) and *Nebbia v. New York*, 291 U.S. 502 (1934).

¹⁵ 198 U.S. 45 (1905) (holding a state regulation of hours worked by bakery employees to be an unconstitutional abridgement of the freedom to contract protected by the due process clause of the fourteenth amendment).

Other attempts to regulate working conditions were struck down as beyond congressional power over commerce, e.g., *Hammer v. Dagenhart*, 247 U.S. 251 (1918), and as outside the scope of federal taxing authority, e.g., *Child Labor Tax Case*, 259 U.S. 20 (1922).

¹⁶ 295 U.S. 495 (1935) (holding the National Industrial Recovery Act of 1933 to be an unconstitutional extension of the federal commerce power to matters not directly related to interstate commerce and also declaring the Act an unconstitutional delegation of congressional authority).

¹⁷ 262 U.S. 390 (1923) (holding a state law that prohibited teaching a foreign language to young children to be an unconstitutional interference with the liberty of teachers to pursue their professions, of children to learn, and of parents to guide their children's education, all protected by the due process clause of the fourteenth amendment).

Meyer may be viewed as the forerunner of more recent cases that limit government power to interfere with what often are termed "individual rights." The opinion well could have been framed in first amendment, rather than freedom

trine accepted some relatively clear principle by which to delimit the appropriate sphere for government activity, official defenses to liability might be fashioned to permit reasonably free rein for activity within that sphere and to discourage other activity.¹⁸

The relation of federal to state government has undergone a similarly dramatic transformation over the past fifty years. The retreat from doctrines severely limiting the role of the federal government has been coupled with development of significant federal control over state activity. At the practical level, expanded federal operation, with its greater ability to spread costs and to shift them to persons outside a smaller political jurisdiction, has made state and local governments increasingly dependent on the federal government's decisions respecting the collection and distribution of funds.¹⁹ At the same time, legal doctrines have enhanced federal control over state functions not tied to federal funds. The statutes giving rise to the provision now simply referenced as section 1983 were enacted in the mid-1800s.²⁰ They had little effect, however, until the Supreme Court began applying the restrictions contained in the Bill of Rights to the states, through the doctrine of incor-

of contract, terms, making liberty of thought and speech the critical values protected. Those were not, however, the terms in which *Meyer* was cast. Although students of constitutional law today must grapple with "free speech" cases that may look like *Meyer* and with "substantive due process" cases (e.g., *Roe v. Wade*, 410 U.S. 113 (1973), and its progeny) that are close relatives of *Lochner*, see note 15 *supra*, the earlier cases evince a belief that government should be limited to performing only a relatively few functions; the more recent cases, on the other hand, concede a wide range of functions to be legitimate subjects of governmental action, but subject such action to judicial scrutiny in order to protect interests not "adequately" safeguarded by the other branches. See text accompanying notes 23-25 *infra*.

¹⁸ There is at least a plausible argument that some of the older cases in which official defenses to liability were rejected are explicable as attempts to vindicate certain basic limitations on government action. See the discussion of *Miller v. Horton*, notes 57-59 *infra* & accompanying text, in which tangible property was physically harmed without compensation and without satisfaction of the narrow rules allowing government interference with property.

¹⁹ See, e.g., *Revenue Sharing with the States: Hearing Before the Subcomm. on the City of the House Comm. on Banking, Finance and Urban Affairs*, 96th Cong., 1st Sess. 311-72 (1979) (report by Congressional Research Service entitled "General Revenue Sharing and Alternatives: Economic Rationales Past and Present"); *General Revenue Sharing—The Issues Before Us: Hearings Before the Subcomm. on Intergovernmental Relations of the Senate Comm. on Governmental Affairs*, 96th Cong., 1st Sess. 1 (1979); Muller & Fix, *Federal Solicitude, Local Costs: The Impact of Federal Regulation on Municipal Finances*, 4 REG. 29 (Jul./Aug. 1980).

²⁰ 42 U.S.C. § 1983 (1976) codifies a provision enacted in the Civil Rights Act of 1871. Act of Apr. 20, 1871, ch. 22, § 1, 17 Stat. 13. Related provisions were derived from the Civil Rights Act of 1866, Act of Apr. 9, 1866, ch. 31, § 1, 14 Stat. 27 (codified at 42 U.S.C. §§ 1981-1982 (1976)), and the Civil Rights Act of 1870, Act of May 31, 1870, ch. 114, § 16, 16 Stat. 144 (codified at 42 U.S.C. § 1981 (1976)). See note 263 *infra* for the text of § 1983.

poration into the fourteenth amendment's due process clause, and expanding the protection afforded by the equal protection clause.²¹ As the substantive protections of federal law against state action have expanded, so has the ambit of potential official liability under section 1983. And as potential liability has expanded, section 1983 damage suits often have provided occasion for dispute over the proper roles of federal and state law in policing official actions that may be at once tortious and constitutionally proscribed.²²

Official liability cases quite plainly implicate some notion of the role courts should play in our system of government. Decision whether a government officer should be liable in damages for acts arguably performed in his official capacity necessarily involves a choice respecting judicial roles. A broad rule of official excuse from liability could be justified by notions that the judiciary should perform only a limited role in governance and that questions concerning the propriety of officials' acts are appropriately handled by deference to other branches of government.²³ Narrow rules of official excuse, in contrast, may be premised on views that courts should review a wide range of decisions by other branches and need worry but little that they might be intruding in areas better left to coordinate branches.²⁴ While there does not appear to be a consensus among legal scholars on the role courts should play, there does appear to be a consensus that over the last two or three decades courts have played a relatively active role in overseeing the operations of other government branches—witness the increased use of broad injunctive remedies to supervise operation of schools, prisons, and other government institutions.²⁵

²¹ These are principally developments occurring from the 1930s to the 1960s. See generally G. GUNTHER, *CASES AND MATERIALS ON CONSTITUTIONAL LAW* 476-971 (10th ed. 1980) (collecting materials).

²² See, e.g., *Monroe v. Pape*, 365 U.S. 167 (1961).

²³ See generally A. BICKEL, *THE LEAST DANGEROUS BRANCH* (1962); J. ELY, *DEMOCRACY AND DISTRUST* (1980); Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959). See note 24 *infra*.

²⁴ See generally FISS, *The Supreme Court, 1978 Term—Foreword: The Forms of Justice*, 93 HARV. L. REV. 1 (1979); Gunther, *The Subtle Vices of the "Passive Virtues"—A Comment on Principle and Expediency in Judicial Review*, 64 COLUM. L. REV. 1 (1964); Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063 (1980). Each of the authors cited in this note and in note 23 *supra* argue for "principled" judicial decisionmaking. They differ significantly, however, on the source of the principles and on the extent to which the interests protected by courts should overcome those protected by the political branches.

²⁵ See, e.g., O. FISS, *THE CIVIL RIGHTS INJUNCTION passim* (1978); Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976); Eisenberg & Yeazell, *The Ordinary and the Extraordinary in Institutional Litigation*, 93 HARV. L. REV. 465 (1980); Frug, *The Judicial Power of the Purse*, 126 U. PA. L. REV. 715 (1978).

Finally, decisions respecting official liability call into play ideas about the nature of joint or multiperson enterprises. Officials invariably are part of some governmental entity. The way in which the various components of that entity relate one to another has important implications for assessing the necessity and the utility of an "external" check over the actions of one component-part. Government officials, thus, are akin to corporate officers and employees. The manner in which an organization, whether governmental or private enterprise, structures an employee's incentives will, as a general matter, allow prediction of the employee's behavior absent liability and of the manner in which the employee will respond to the threat of liability. The notion that stock ownership in publicly held corporations did not give stockholders effective control over the behavior of corporate employees was instrumental in the expansion over the last fifty years of the legal remedies stockholders enjoy to challenge or to gain recompense for corporate acts with which they disagree.²⁶ The perceived absence of other control mechanisms mandated provision of some legal remedy for dissenting stockholders. Recent writings indicating that a variety of relatively effective control mechanisms operates to harmonize managers' and stockholders' interests²⁷ have prompted calls for relaxation or elimination of some legal constraints on managerial conduct.²⁸

²⁶ See, e.g., *Roland Int'l Corp. v. Najjar*, 407 A.2d 1032 (Del. 1979); *Singer v. Magnavox Co.*, 380 A.2d 969 (Del. 1977).

²⁷ E.g., Fama, *Agency Problems and the Theory of the Firm*, 88 J. POL. ECON. 288 (1980); Jensen & Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FINANCIAL ECON. 305 (1976). Jensen and Meckling divide the various mechanisms for promoting increases in the joint product of firm members into two groups. One group consists of actions taken by someone who might be thought of as a "principal" to insure greater fidelity to his aims by one who might be viewed as his "agent." The other group of actions, termed "bonding costs," are those undertaken by the agent to demonstrate greater probability of fidelity to the principal's purposes. Jensen & Meckling, *supra*, at 308-10. Fama extends this analysis, arguing that the range of mechanisms for securing maximum joint product leaves each participant in a firm with some opportunities for self-interested action at the expense of joint product and, at least in a competitive environment for production and consumption of what the participants have to offer (money, managerial skill, etc.), considerable constraints (discipline) on the ability of any participant to take advantage of those opportunities. Given the reciprocal nature of the opportunity-discipline construct, Fama believes traditional principal-agent analysis to be misleading. Fama, *supra*. A good general treatment of both the problems of conflicting interests in joint enterprises and some means for harmonizing them is K. ARROW, *THE LIMITS OF ORGANIZATION* (1974). An application of similar analysis in the context of government decisionmaking is J. GREEN & J. LAFFONT, *INCENTIVES IN PUBLIC DECISION-MAKING* (1979).

²⁸ See, e.g., Dooley, *Enforcement of Insider Trading Restrictions*, 66 VA. L. REV. 1 (1980).

Scholarly writings on official liability have begun to recognize the significance of these five threads running through the judicial decisions.²⁹ This article does not attempt a comprehensive integration of these areas into analysis of official liability but rather focuses on the first and last areas: the implications of tort principles and of the relations among members of an enterprise to official liability. Objections that all levels of government have engaged in activity ill-suited to the type of collective and coercive decision-making characteristic of government, that the federal government has improperly interfered with matters better left to state or local control, and that the courts have unduly expanded the ambit of substantive protections against government action will not be addressed, although concerns in each area undoubtedly have affected case development and can provide the basis for critiques of official liability decisions. Further, the connection between official excuse from liability and the proper underlying standard of tort liability, explored previously by Professor Epstein,³⁰ is not pursued here, in part because Epstein is correct that, by and large, the basic liability analysis and the official excuse analysis will cover the same ground. Instead, this article builds on four prior efforts to relate liability principles and organizational concerns to official liability. Professor Mashaw has illustrated the importance of focusing on the incentive effects of liability rules.³¹ Professor Shepsle has demon-

²⁹ See Baxter, *Enterprise Liability, Public and Private*, 42 LAW & CONTEMP. PROB. 45 (Winter 1978); Bermann, *Integrating Governmental and Officer Tort Liability*, 77 COLUM. L. REV. 1175 (1977); Boyer, *Civil Liability for Prejudicial Pre-Trial Statements by Prosecutors*, 15 AM. CRIM. L. REV. 231 (1978); Davis, *An Approach to Legal Control of the Police*, 52 TEX. L. REV. 703 (1974); Engdahl, *Immunity and Accountability for Positive Governmental Wrongs*, 44 U. COLO. L. REV. 1 (1972); Epstein, *Private-Law Models for Official Immunity*, 42 LAW & CONTEMP. PROB. 53 (Winter 1978); Freed, *Executive Official Immunity for Constitutional Violations: An Analysis and a Critique*, 72 NW. U.L. REV. 526 (1977); Love, *Damages: A Remedy for the Violation of Constitutional Rights*, 67 CALIF. L. REV. 1242 (1979); Mashaw, *Civil Liability of Government Officers: Property Rights and Official Accountability*, 42 LAW & CONTEMP. PROB. 8 (Winter 1978); Newman, *Suing the Lawbreakers: Proposals to Strengthen the Section 1983 Damage Remedy for Law Enforcers' Misconduct*, 87 YALE L.J. 447 (1978); Olson, *Official Liability and its Less Legalistic Alternatives*, 42 LAW & CONTEMP. PROB. 67 (Winter 1978); Rosenberg, *Stump v. Sparkman: The Doctrine of Judicial Impunity*, 64 VA. L. REV. 833 (1978); Shepsle, *Official Errors and Official Liability*, 42 LAW & CONTEMP. PROB. 35 (Winter 1978); Whitman, *Constitutional Torts*, 79 MICH. L. REV. 5 (1980); Yudof, *Liability for Constitutional Torts and the Risk-Averse Public School Official*, 49 S. CAL. L. REV. 1322 (1976).

³⁰ Epstein, *supra* note 29.

³¹ Mashaw, *supra* note 29. Mashaw also identified the personal gain to officials that would result if, through a grant of immunity, they enjoyed a "property right" to err in performing their assigned tasks. This point received earlier elaboration in a different context in McKean, *Property Rights Within Government, and Devices to Increase Governmental Efficiency*, 39 S. ECON. J. 177 (1972).

strated some difficulties of using liability rules to prevent official errors given the different sorts of injuries such errors produce.³² Professor Olson has observed the special difficulty of defining and correcting official errors, owing to the nature of a bureaucracy engaged in producing "public goods."³³ Professor Baxter has discussed the utility of enterprise liability in other contexts to correct errors by employees of a profit-making "bureaucracy," although noting the possibility that governmental bureaucracies do not need or will not similarly respond to liability for employee errors.³⁴ This article integrates these insights into an analysis of the appropriate scope of personal damage liability for government officers.

Part II of the article traces the movement from a two-tiered system of official excuse from liability to a uniform "qualified immunity" for all officers who are said to perform neither judicial nor legislative tasks. Part III explains the case development on the basis of tort principles concerned with shaping individual behavior. Several categories of official activity are identified, each distinguished from the others by the nature of the nonliability incentives that constrain its performance. These categories might very roughly approximate the different classes of officials identified by the Supreme Court, although the fit is far from perfect. Under a limiting assumption about the liability avoidance measures generated by its decisions, the Supreme Court's official liability decisions can be justified as beneficial efforts to shape official behavior at tolerable systemic cost. Granting the assumption, the Court generally has provided a broad excuse from liability to officials who have strong incentives to act in a socially desirable manner and whose actions can be reviewed only at high systemic cost, while conferring a narrower excuse from liability to officials who have weak incentives to act in a socially desirable fashion and whose conduct can be reviewed at relatively low systemic cost. Part IV relaxes the assumption about liability avoidance measures and explores the impact of liability on individual activity given different possible relations among members of the individual's employing enterprise. The effect of the Supreme Court's decisions is questionable once the limiting assumption is abandoned. Part V explores possible differences between placing liability on officials and placing it on the employing enterprise, suggesting that under certain conditions the latter course might be preferable.

³² Shepsle, *supra* note 29.

³³ Olson, *supra* note 29.

³⁴ Baxter, *supra* note 29.

II. JUDICIAL DEVELOPMENT OF THE QUALIFIED IMMUNITY STANDARD

This part of the article sketches the history of government officers' personal damage liability, which I refer to as official liability, as developed by federal and state courts. The discussion focuses on Supreme Court decisionmaking. State courts, as well as lower federal courts, generally have followed the Supreme Court's lead in this area.³⁵

A. *The Traditional Pattern*

Prior to the middle of the twentieth century, American officials could be divided, for purposes of describing liability for their official actions, into two categories. Officials in the first group were immunized broadly from liability. Officials in the second group depended on particularized privileges to defend against damage actions. The central figures in the first group were judges sitting in courts of general jurisdiction.³⁶ Even allegations that a judge acted maliciously were insufficient to remove his immunity to damage liability for actions done in his judicial capacity.³⁷ Legislators, too, were held immune from liability.³⁸ At the federal level, this immunity was premised on the speech or debate clause of the Constitution, although the protection extended beyond the literal confines of that clause.³⁹ As with judges, inquiry into a legislator's motives was barred.⁴⁰ The final members of this group of officials were high-ranking executive officers.⁴¹ The clearest

³⁵ See, e.g., *Armstrong v. Ross Township*, 82 Mich. App. 77, 266 N.W.2d 674 (1978); *Tyler v. Whitehead*, 583 S.W.2d 240 (Mo. Ct. App. 1979); *Centennial Land & Dev. Co. v. Township of Medford*, 165 N.J. Super. 220, 397 A.2d 1136 (1979); *Neiswender v. Edinger*, 59 Ohio App. 2d 25, 392 N.E.2d 580 (1978); *Ferri v. Rosetti*, 483 Pa. 327, 396 A.2d 1193 (1979).

³⁶ See 2 T. COOLEY, *LAW OF TORTS* §§ 299, 312 (4th ed. 1932); Jennings, *Tort Liability of Administrative Officers*, 21 MINN. L. REV. 263, 270-74 & n.29 (1937) (citing cases). The historical roots of this immunity are discussed in Becht, *The Absolute Privilege of the Executive in Defamation*, 15 VAND. L. REV. 1127, 1135-36 (1962), and Gray, *Private Wrongs of Public Servants*, 47 CALIF. L. REV. 303, 307-16 (1959).

³⁷ W. PROSSER, *THE LAW OF TORTS* § 132, at 987-88 (4th ed. 1971); Jennings, *supra* note 36, at 270-73; see *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335 (1871); *Anderson v. Park*, 57 Iowa 69, 71-72, 10 N.W. 310, 311 (1881).

³⁸ E.g., *Kilbourn v. Thompson*, 103 U.S. 168 (1881).

³⁹ *Id.* See note 3 *supra*. See also Engdahl, *supra* note 29, at 42.

⁴⁰ See W. PROSSER, *supra* note 37, § 132, at 988; Gray, *supra* note 36, at 318-22.

⁴¹ See W. PROSSER, *supra* note 37, § 132, at 988; Becht, *supra* note 36, at 1136-37; Freed, *supra* note 29, at 530. As noted by Professor Freed, *id.* 528

statement of executive immunity is the Supreme Court's 1896 decision in *Spalding v. Vilas*,⁴² holding the Postmaster General immune from liability for advising the plaintiff's clients that they had no obligation to pay their attorney any part of certain awards from the Post Office Department.⁴³

We are of the opinion that the same general considerations of public policy and convenience which demand for judges of courts of superior jurisdiction immunity from civil suits for damages arising from acts done by them in the course of the performance of their judicial functions, apply to a large extent to official communications made by heads of Executive Departments when engaged in the discharge of duties imposed upon them by law. . . . In exercising the functions of his office, the head of an Executive Department . . . should not be under an apprehension that the motives that control his official conduct may, at any time, become the subject of inquiry in a civil suit for

n.15, the view that executive officers at all levels were, at least at one time, subject to damage suits on the same basis as other citizens, see A. DICEY, *INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION* 193 (10th ed. 1959), has been sharply criticized. See Davis, *Administrative Officers' Tort Liability*, 55 MICH. L. REV. 201, 202 (1956); Jaffe, *Suits Against Governments and Officers: Damage Actions*, 77 HARV. L. REV. 209, 215-17 (1963). For a detailed view of the history of suits against executive officers and the relation between such actions and other mechanisms for governmental accountability, see the series of articles written by Professor Borchard. Borchard, *Governmental Liability in Tort*, 34 YALE L.J. 1 (1924) (Part I); *id.* 129 (Part II); *id.* 229 (1925) (Part III); Borchard, *Governmental Responsibility in Tort*, 36 YALE L.J. 1 (1926) (Part IV); *id.* 757 (1927) (Part V); *id.* 1039 (Part VI); Borchard, *Governmental Responsibility in Tort*, 28 COLUM. L. REV. 577 (1928) (Part VII); Borchard, *Theories of Governmental Responsibility in Tort*, 28 COLUM. L. REV. 734 (1928) (Part VIII).

⁴² 161 U.S. 483 (1896).

⁴³ Plaintiff Spalding was employed by a number of postmasters to obtain review and readjustment of their salaries. After their claims for increased salaries were rejected by the Postmaster General, Spalding, apparently operating as contracting agent and lobbyist, made arrangements for his compensation from the postmaster-clients contingent on his securing payment on their claims. He then helped gain passage of legislation providing for payment of these claims by the United States. Spalding alleged that Vilas, who became Postmaster General after the original refusal of the claims advanced by Spalding, endeavored "to . . . harass the plaintiff, and to injure him in his good name and in his business, without any good reason therefor, and with malicious intent, . . . interposed all possible obstacles to the collection of said claims, and undertook to induce the clients of the plaintiff to repudiate the contracts they had made." *Id.* 486 (quoting from plaintiff's complaint). Vilas sent the funds voted by Congress directly to each claimant, rather than to the attorney, along with a letter stating that no attorney's services were necessary to present the claim before the department, that Congress desired all the proceeds to reach the individual postmasters, and that any transfer of the claim or power of attorney for receiving payment of the claim was null and void. Spalding claimed compensatory damages of \$25,000 for breach of the various contracts, and claimed an additional \$75,000 for injury to his good name and reputation. *Id.* 484-89.

damages. It would seriously cripple the proper and effective administration of public affairs as entrusted to the executive branch of the government, if he were subjected to any such restraint.⁴⁴

Although the immunity of this first group of officials often was framed broadly, the cases giving rise to the immunity are more ambiguous. Many opinions underline the requirement that to be immune the official must act within his jurisdiction.⁴⁵ As applied to most judges and legislators, this requirement does not seem to have been taken very seriously.⁴⁶ For judges sitting in courts of special and limited jurisdiction, however, and for executive officers, there appears to have been some confusion over this requirement. At times the requirement of jurisdiction was taken to be separate from authority, using the latter term to mean that the disputed action was in fact consistent with ultimate interpretation of controlling statutory and constitutional provisions. In *Spalding*, for instance, the Court distinguished "action taken by the head of a Department in reference to matters which are manifestly or palpably beyond his authority, and action having more or less connection with the general matters committed by law to his control or supervision."⁴⁷ The action having "more or less connection with the general matters" assigned to an official could be found to be within his jurisdiction but not in fact authorized. The Court in *Spalding* did not need to apply this distinction between legal authority (acts authorized by law) and jurisdiction (conduct related to subject matters within which some action, though not necessarily the disputed action, is authorized) because it found the Postmaster General's actions authorized by law.⁴⁸

An approach contrary to the *Spalding* dictum was taken in other cases, holding acts to be within an official's jurisdiction only when those particular acts were subsequently found to have been

⁴⁴ *Id.* 498.

⁴⁵ See, e.g., *Randall v. Brigham*, 74 U.S. (7 Wall.) 523, 535 (1869); *T. COOLEY*, *supra* note 36, § 315, at 437 n.38, 440 n.46 (citing cases).

⁴⁶ See, e.g., *Kilbourn v. Thompson*, 103 U.S. 168 (1881) (finding defendants' actions "in excess" of jurisdiction without finding the action outside defendants' jurisdiction); *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335 (1872) (same); *Calhoun v. Little*, 106 Ga. 336, 32 S.E. 86 (1898) (same); *National Sur. Co. v. Miller*, 155 Miss. 115, 124 So. 251 (1929) (en banc) (same); *Lange v. Benedict*, 73 N.Y. 12 (1878) (same), *writ of error dismissed*, 99 U.S. 68 (1879).

⁴⁷ 161 U.S. at 498.

⁴⁸ *Id.* 493.

authorized.⁴⁹ A half-century before *Spalding in Kendall v. Stokes*,⁵⁰ another suit against the Postmaster General, this view was taken in dissent by Justice McLean, the only Justice to speak directly to the issue.⁵¹ Noting that the Postmaster acted "under the sanction of the President, and in accordance with the opinion of the attorney-general" in refusing to pay certain monies to the plaintiff, Justice McLean nonetheless would have held the defendant liable in damages.⁵² He further would have applied this approach to all officials, Supreme Court Justices and the President included.⁵³

Generally, however, courts took an expansive view of jurisdiction for the officials in the first group, and, although the cases are by no means uniform on this score,⁵⁴ adopted the more restrictive view espoused by Justice McLean for all others.⁵⁵ Thus, for the second group of officials an action was not immunized by virtue of the official's status unless authorized by law.⁵⁶ An influential example is *Miller v. Horton*,⁵⁷ an 1891 decision of the Supreme Judicial Court of Massachusetts holding members of the board of health of a Massachusetts township liable in damages for destroying the plaintiff's horse. The defendants were ordered to kill the horse by two commissioners on contagious disease who certified that it was diseased. Veterinarians who also examined the horse declared it healthy, and the defendants delayed killing it while they attempted to persuade the commissioners to alter their order. The commission would not do so, and defendants killed the horse. The trial court found that the horse was not diseased, but held for defendants on the question of liability. The appellate court, speaking through Justice Holmes, reversed, stating that while defendants

⁴⁹ See, e.g., *Bates v. Clark*, 95 U.S. 204 (1877); *Buck v. Colbath*, 70 U.S. (3 Wall.) 334 (1865); *Wise v. Withers*, 7 U.S. (3 Cranch) 330 (1806).

⁵⁰ 44 U.S. (3 How.) 92 (1845).

⁵¹ *Id.* 903-16 (Appendix; McLean, J., dissenting). The majority disposed of the case on the ground that the plaintiff in a prior case had secured mandamus directing money to be credited to him. See *Kendall v. Stokes*, 37 U.S. (12 Pet.) 524 (1838). The Court held the prior action a bar to the suit for damages, although different sums were at issue in the two actions. 44 U.S. at 105-12.

⁵² 44 U.S. at 909.

⁵³ *Id.* 907.

⁵⁴ See cases cited in 3 K. DAVIS, *ADMINISTRATIVE LAW TREATISE* § 26.05, at 534-35 nn.16-17 (1958).

⁵⁵ It was common to explain the different standards, when explicitly acknowledged, by reference to the ministerial or discretionary nature of the action involved. That distinction, however, is difficult to make meaningful in light of the cases. See W. PROSSER, *supra* note 37, § 132, at 988-92; Jaffe, *supra* note 41, at 218-19; James, *Tort Liability of Governmental Units and Their Officers*, 22 U. CHI. L. REV. 610, 640-45 (1955); Jennings, *supra* note 36, at 284-302.

⁵⁶ See cases cited in Engdahl, *supra* note 29, at 17 n.71.

⁵⁷ 152 Mass. 540, 26 N.E. 100 (1891).

were cloaked with whatever authority the commissioners possessed, that authority extended only to condemning animals that were in fact diseased. Justice Holmes reasoned that the legislature could not order all animals, healthy or not, destroyed without compensating the owners, that no compensation was provided for in the relevant statute except such as the commissioners in their discretion chose to grant, and that, consequently, the statute only authorized the killing of animals in fact diseased, not those suspected of disease.⁵⁸ Absent authorization by law, the commissioners and defendants had no jurisdiction; the killing, therefore, was tortious.⁵⁹

Despite the application of a similar analysis in other cases, also requiring a finding of authority under ultimate interpretation of law, officials in this second (non-immune) group were not wholly without protection. There were a number of specific privileges they could claim even if they failed to establish legal authority for their act. Such privileges sometimes were tied to a given official's position; policemen, for example, could defend against an action for false arrest on the strength of a facially valid warrant.⁶⁰ Other privileges were particular applications of generally available defenses such as the privilege of fair comment in actions for defamation.⁶¹ These various privileges, along with the absence of any right of action to redress certain harms,⁶² appear to have offered officials in the second group considerable protection against damage liability.

That was the state of the law when Judge Learned Hand issued his 1949 opinion in *Gregoire v. Biddle*,⁶³ a suit for false arrest brought against the U.S. Attorney General, the Director of the Enemy Alien Control Unit of the Department of Justice,

⁵⁸ *Id.* at 542-48, 26 N.E. at 100-03.

⁵⁹ The *Miller* decision is explained by Dickinson and Jennings as the result of the absence of appropriate due process safeguards in the taking of tangible property. Given the then-current views of property rights, and the limited circumstances under which those rights gave way to "public" interests, no taking outside a narrow set of emergency circumstances could be sustained absent opportunity for a hearing. That opportunity, under the statute at issue in *Miller*, could only come in a damage suit. See J. DICKINSON, *ADMINISTRATIVE JUSTICE AND THE SUPREMACY OF LAW IN THE UNITED STATES* 44-47, 107-08 (1927); Jennings, *supra* note 36, at 281-84. See also *McCord v. High*, 24 Iowa 336, 350 (1868).

⁶⁰ See W. PROSSER, *supra* note 37, § 25, at 127-28.

⁶¹ See Becht, *supra* note 36, at 1128-36; Handler & Klein, *The Defense of Privilege in Defamation Suits Against Government Executive Officials*, 74 HARV. L. REV. 44 (1960).

⁶² See T. COOLEY, *supra* note 36, § 300.

⁶³ 177 F.2d 579 (2d Cir. 1949), *cert. denied*, 339 U.S. 949 (1950).

and a District Director of Immigration.⁶⁴ Hand explained the necessity of absolute judicial immunity, noted its extension to prosecutors charged with malicious prosecution⁶⁵ and, citing *Spalding*, to some other executive officers, and held that all of the officials sued by Gregoire similarly were covered by an absolute immunity even if they acted maliciously, from personal spite, and without legal basis:

It does indeed go without saying that an official, who is in fact guilty of using his powers to vent his spleen upon others, or for any other personal motive not connected with the public good, should not escape liability for the injuries he may so cause; and, if it were possible in practice to confine such complaints to the guilty, it would be monstrous to deny recovery. The justification for doing so is that it is impossible to know whether the claim is well founded until the case has been tried, and that to submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties. . . . In this instance it has been thought in the end better to leave unredressed the wrongs done by dishonest officials than to subject those who try to do their duty to the constant dread of retaliation.⁶⁶

Judge Hand was careful to explain why an official's liability should not turn on whether his acts were in fact authorized, despite the frequency of dicta linking official immunity to legal authority:

The decisions have, indeed, always imposed a limitation upon the immunity that the official's act must have been within the scope of his powers; and it can be argued that official powers, since they exist only for the public good, never cover occasions where the public good is not their aim, and hence that to exercise a power dishonestly is necessarily to overstep its bounds. A moment's reflection shows, however, that that cannot be the meaning of the limitation without defeating the whole doctrine. What is meant by saying that the officer must be acting within

⁶⁴ In all, five defendants were named—two successive Attorneys General and two successive Directors of the Enemy Alien Control Unit in addition to the District Director of Immigration for Ellis Island.

⁶⁵ *Yaselli v. Goff*, 12 F.2d 396 (2d Cir. 1926), *aff'd per curiam*, 275 U.S. 503 (1927), held that even allegations that a prosecutor acted maliciously in initiating a prosecution would not be sufficient grounds for subjecting him to suit.

⁶⁶ 177 F.2d at 581.

his power cannot be more than that the occasion must be such as would have justified the act, if he had been using his power for any of the purposes on whose account it was vested in him.⁶⁷

Without acknowledging his departure from precedent,⁶⁸ Hand generalized the rationale for immunity to cover at least middle-level officials, if not all officials. His construction of what brought an action within an official's jurisdiction constituted a straightforward rejection of the approach taken by Justice Holmes in *Miller*; neither the nature of the defendant's office, nor the conduct at issue, enter into the calculus. Thus, *Gregoire* began the breakdown of the established two-tier system of protections.

B. *The Supreme Court: Development of a Qualified Immunity Doctrine*

Beginning a decade after *Gregoire*, the Supreme Court began changing the law of official liability more substantially. Although the Court did not create a single rule for all officials, it did make all executive officers subject to the same rule. This was accomplished by reducing the protections formerly accorded higher-ranking officers and expanding the protections accorded lower-ranking officials.

The starting point was *Barr v. Matteo*,⁶⁹ a defamation action by two employees of the Office of Rent Stabilization against the Acting Director of that unit. The defendant Barr had issued a press release responding to inquiries about an agency practice of questionable legality.⁷⁰ In the press release, Barr named plaintiffs

⁶⁷ *Id.*

⁶⁸ Hand cited a number of cases purportedly extending immunity to subcabinet level officials. Examination of these cases reveals that all but one either involve officials of Cabinet rank or turn on a specific privilege to communicate information that might otherwise be defamatory. See *Lang v. Wood*, 92 F.2d 211 (D.C. Cir.), *cert. denied*, 302 U.S. 686 (1937); *Smith v. O'Brien*, 88 F.2d 769 (D.C. Cir. 1937); *Standard Nut Margarine Co. v. Mellon*, 72 F.2d 557 (D.C. Cir.), *cert. denied*, 293 U.S. 605 (1934); *Mellon v. Brewer*, 18 F.2d 168 (D.C. Cir.), *cert. denied*, 275 U.S. 530 (1927). The lone exception is *Brown v. Rudolph*, 25 F.2d 540 (D.C. Cir.), *cert. denied*, 277 U.S. 605 (1928), adopting the less restrictive view of jurisdiction for commissioners of the District of Columbia who decided (improperly, the court holds) to commit the plaintiff as insane. The court does, however, explicitly find that defendants performed a function that called for their exercise of discretion. In *Gregoire*, Hand does not tie his analysis to any requirement that the function forming the basis of the suit be deemed discretionary rather than ministerial.

⁶⁹ 360 U.S. 564 (1959).

⁷⁰ The agency's predecessor, the Office of Housing Expediter, expecting its statutory existence to expire at the end of the fiscal year, had used some funds to

as the employees responsible for the practice.⁷¹ The case came before the Court for disposition of Barr's claim that his statement, if defamatory, was absolutely privileged. Justice Harlan, speaking for a plurality of four, upheld the claim of privilege, relying principally upon *Gregoire* and *Spalding*.⁷² He declared that the office held by the defendant was irrelevant except as it related to the scope of his discretion and adopted the broad view that activities pursued within the scope of that discretion were privileged: "The fact that the action here taken was within the outer perimeter of [Barr's] line of duty is enough to render the privilege applicable" ⁷³

Eight years later in *Pierson v. Ray*,⁷⁴ the Court again faced a question of official liability, this time in a suit brought under 42 U.S.C. § 1983,⁷⁵ which makes liable those who under color of state law infringe federally guaranteed rights.⁷⁶ Plaintiffs claimed that they were denied equal protection of the law when they were arrested, convicted, and sentenced under a Mississippi breach-of-peace statute for using segregated facilities and refusing to leave when ordered by the police to do so. The arresting policemen, and the judge who presided over plaintiffs' trial and sentenced them, were named as defendants, and a false arrest count under Mississippi law was joined with the section 1983 suit against the policemen. Having earlier held that section 1983 did not abolish immunities and privileges enjoyed under state law by legislators,⁷⁷

pay case settlements for unused annual leave. It immediately rehired the employees on a temporary basis with the understanding that if the life of the agency was extended, the employees would be rehired on a permanent basis. The practice was held illegal by the General Accounting Office, but that decision was reversed by the Court of Claims. *Id.* 565-66 & n.3.

⁷¹ Plaintiffs alleged that Barr acted maliciously in so doing. *Id.* 568.

⁷² *Id.* 569-76.

⁷³ *Id.* 575. Justice Black concurred, restricting his opinion to the question whether libel suits based on press releases would restrain officials from providing information to the public. *Id.* 576-78 (Black, J., concurring). Chief Justice Warren and Justices Douglas and Brennan believed a qualified privilege sufficient, *id.* 578-86 (Warren, C.J., dissenting, joined by Douglas, J.); *id.* 586-92 (Brennan, J., dissenting), while Justice Stewart believed the disputed action was not within Barr's authority, *id.* 592 (Stewart, J., dissenting). Thus, a total of four justices dissented.

⁷⁴ 386 U.S. 547 (1967).

⁷⁵ 42 U.S.C. § 1983 (1976). See note 263 *infra* for the text of the statute.

⁷⁶ In 1961, the Court in *Monroe v. Pape*, 365 U.S. 167 (1961), had rejected the arguments of police officers sued under § 1983 that they did not act under color of state law because state law did not authorize their actions but rather made them illegal. *Id.* 172-87. Justice Frankfurter, dissenting, urged that unconstitutional actions condemned by state law should be left to the states to remedy while § 1983 should be used only to redress unconstitutional actions condoned by state law. *Id.* 202-59 (Frankfurter, J., dissenting).

⁷⁷ See *Tenney v. Brandhove*, 341 U.S. 367 (1951).

the Court quickly disposed of the charges against the judge, declaring that if judicial immunity were to be abrogated, Congress should do so explicitly.⁷⁸ The Court then noted that police officers generally and under Mississippi law enjoyed a privilege from liability for false arrest or false imprisonment if they had probable cause to believe the persons arrested or detained had violated a statute and if they in good faith believed the statute to be valid.⁷⁹ There was no explanation whether the rule of the majority of American jurisdictions or of the state from which the suit arose controlled.⁸⁰ Whatever the source of the privilege, the Court plainly stated its view that this privilege was available in the section 1983 count as well as in the state law count, viewing the federal action here as an analogue to the common law tort suit for false arrest.⁸¹

The pivotal decision in the Supreme Court's line of official liability cases followed seven years after *Pierson*. *Scheuer v. Rhodes*⁸² was a section 1983 damage action brought by representatives of the estates of three students killed in the much-publicized episode on the campus of Kent State University. Named defendants included the Governor of Ohio, the Adjutant General of the Ohio National Guard and his assistant, various officers and members of the National Guard, and the president of the university. The court of appeals below had advanced alternative grounds for barring the suit: first, the suit was barred by the eleventh amendment and by state law of sovereign immunity; alternatively, it was barred by a *Gregoire*-type immunity of executive officers for actions generally within their authority, without regard to the motivation for such actions.⁸³ The dissent argued that executive immunity was fundamentally at odds with the purposes of section 1983.⁸⁴ Eschew-

⁷⁸ 386 U.S. at 553-55.

⁷⁹ *Id.* 555-56.

⁸⁰ The Court subsequently did address this matter. In *Imbler v. Pachtman*, 424 U.S. 409 (1976), the Court plainly stated that it would read § 1983 as consistent "with general principles of tort immunities and defenses," *id.* 418, indicating that its synthesis of common law holdings, and not the rules of the state from which a suit arises, will govern.

⁸¹ 386 U.S. at 557-58. Justice Douglas, dissenting, would not have allowed any common law privileges or immunities as defenses to actions under § 1983. He viewed the federal statute not as an attempt simply to give victims of official discrimination a neutral forum for resolution of their common law claims but as an effort to alter rules existing under common law that might operate to sanction official discrimination. *Id.* 558-67 (Douglas, J., dissenting).

⁸² 416 U.S. 232 (1974).

⁸³ *Krause v. Rhodes*, 471 F.2d 430 (6th Cir. 1973), *rev'd sub nom. Scheuer v. Rhodes*, 416 U.S. 232 (1974).

⁸⁴ *Id.* 447-68.

ing the lines of decision proffered by both majority and dissent below, the Supreme Court took its *Pierson* decision as the springboard for resolving the question now presented. The Court observed that a defense of "good faith and probable cause" had been recognized in *Pierson* and that this defense rested on considerations similar to those supporting the privilege upheld in *Barr*. The Court then continued:

These considerations suggest that, in varying scope, a qualified immunity is available to officers of the executive branch of government, the variation being dependent upon the scope of discretion and responsibilities of the office and all the circumstances as they reasonably appeared at the time of the action on which liability is sought to be based. It is the existence of reasonable grounds for the belief formed at the time and in light of all the circumstances, coupled with good-faith belief, that affords a basis for qualified immunity of executive officers for acts performed in the course of official conduct.⁸⁵

Given the absence of a factual record, these principles could not be applied to the named defendants. Rather, the Court remanded the case for inquiry

whether the Governor and his subordinate officers were acting within the scope of their duties under the Constitution and laws of Ohio; whether they acted within the range of discretion permitted the holders of such office under Ohio law and whether they acted in good faith both in proclaiming an emergency and as to the actions taken to cope with the emergency so declared.⁸⁶

The *Scheuer* decision thus created a generalized defense to actions under section 1983, without regard to whether under state law a similar, broader, or narrower defense would be available to an official sued in tort for the same alleged wrong. Lower-ranking officials who previously enjoyed only particular privileges to specific tort actions share this "qualified immunity" with the chief executive of the state, who previously would have been immune from suit for all acts within the "outer perimeter" of his authority. Although the Court was not precise on how the defense of good faith and reasonable grounds would be judged, the impression conveyed was that more than a pro forma inquiry would be con-

⁸⁵ 416 U.S. at 247-48.

⁸⁶ *Id.* 250.

ducted into the congruence of an official's acts with the scope of his authority and into the bona fides of his motivation for acting.⁸⁷ Presumably an adverse finding on either score would vitiate his defense.

Although *Scheuer* can derive support from prior decisions, it substantially alters the nature of defenses to official liability. The *Barr* and *Pierson* decisions had set the stage for *Scheuer*—in *Barr*, instead of relying on a specific privilege against defamation suits, the Court extended broad official immunity to lower-level officials, while in *Pierson* the Court recognized state privileges in a federal action without clearly delineating the relation between them. *Scheuer*, however, goes well beyond those decisions by melding a specific privilege (for police officers sued in false arrest actions) with the rationale for immunity to create universal “qualified immunity” for state officials sued under section 1983. For these officials, the breakdown of the formerly separate protections accorded higher- and lower-ranking executive officers was complete.

Far from settling matters, *Scheuer* raised a number of other questions. With rare exception, the Supreme Court, and lower courts as well, have continued to replace formerly heterogeneous defenses to liability with a single, uniform rule.⁸⁸ Also with rare exception, the rule bears ever less resemblance to the immunity of *Gregoire* and *Spalding*. Since *Scheuer*, the Court has held that an official bears the burden of pleading his immunity; plaintiffs need not allege that an official acted outside the scope of his authority or in bad faith.⁸⁹ In most of the circuits, the official bears the burden of persuasion for the immunity defense as well.⁹⁰ An official

⁸⁷ The Court stressed the need for development of a factual record and for affording plaintiffs the opportunity “to contest the facts” asserted to justify the defendants’ actions. *Id.* 249-50.

⁸⁸ See, e.g., *Gomez v. Toledo*, 446 U.S. 635 (1980); *Carlson v. Green*, 446 U.S. 14 (1980); *Butz v. Economou*, 438 U.S. 478 (1978); *Procunier v. Navarette*, 434 U.S. 555 (1978); *O’Connor v. Donaldson*, 422 U.S. 563 (1975); *Wood v. Strickland*, 420 U.S. 308 (1975). See also *Halperin v. Kissinger*, 606 F.2d 1192 (D.C. Cir. 1979), *aff’d by an equally divided court*, 49 U.S.L.W. 4782 (U.S. June 22, 1981) (No. 79-880); *Clark v. United States*, 481 F. Supp. 1086 (S.D.N.Y. 1979), *appeal dismissed*, 624 F.2d 3 (2d Cir. 1980).

⁸⁹ *Gomez v. Toledo*, 446 U.S. at 639-41. The opinion for the Court in *Gomez* does not clearly dictate the allocation of the burden of persuasion—only the burden of pleading is discussed. Justice Rehnquist’s concurrence stresses his understanding that the former matter was not decided. *Id.* 642 (Rehnquist, J., concurring). See note 90 *infra* & accompanying text.

⁹⁰ See, e.g., *Douthitt v. Jones*, 619 F.2d 527, 533 (5th Cir. 1980); *Jacobson v. Rose*, 592 F.2d 515, 523 (9th Cir. 1978) (extending qualified immunity defense to suit under wiretap provisions of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. § 2520 (1976)), *cert. denied*, 442 U.S. 930 (1979); *Dellums v. Powell*, 566 F.2d 167, 176 (D.C. Cir. 1977), *cert. denied*, 438 U.S. 916

will not benefit from his qualified immunity if he intends to deprive another of his federally secured rights, if he knows his actions will do so, or if he "reasonably should have known."⁹¹ Given the imprecision with which many federal rights are defined,⁹² this gloss on the *Scheuer* standard could, if adhered to, significantly diminish the protection afforded by the *Scheuer* immunity. The standards developed in section 1983 actions also have not been confined to that arena, but have been extended to suits against federal officers.⁹³ Qualified immunity has replaced absolute immunity for Cabinet officers,⁹⁴ and lower courts have held that even the President enjoys only a qualified immunity and must have acted in "good faith" to escape liability.⁹⁵

The melding of specific privileges formerly enjoyed by lower-level officials with the immunity formerly enjoyed by higher-level officers has been confined to decisions respecting executive officers. Legislators and judges retain absolute immunity from liability for their official acts. Even here, however, some changes have been

(1978); *Illinois Migrant Council v. Pilliod*, 540 F.2d 1062, 1071 (7th Cir. 1976), *modified in part*, 548 F.2d 715 (7th Cir. 1977) (en banc); *Skehan v. Board of Trustees of Bloomsburg State College*, 538 F.2d 53, 61-62 (3d Cir.) (en banc), *cert. denied*, 429 U.S. 979 (1976); *McLallen v. Henderson*, 492 F.2d 1298, 1300 (8th Cir. 1974); *Jones v. Perrigan*, 479 F.2d 81, 83 (6th Cir. 1974); *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 456 F.2d 1339, 1348 (2d Cir. 1972), *on remand from* 403 U.S. 388 (1971). The First Circuit alone has explicitly placed the burden of showing bad faith or absence of reasonable grounds for belief on the plaintiff. *Gaffney v. Silk*, 488 F.2d 1248 (1st Cir. 1973).

⁹¹ *Wood v. Strickland*, 420 U.S. 308, 318-22 (1975). See also *Procunier v. Navarette*, 434 U.S. 555, 561-62 (1978); *O'Connor v. Donaldson*, 422 U.S. 563, 576-77 (1975); *Buise v. Hudkins*, 584 F.2d 223, 232-33 (7th Cir. 1978), *cert. denied*, 440 U.S. 916 (1979).

⁹² "Due process" was allegedly denied in the case giving rise to this standard. See *Wood v. Strickland*, 420 U.S. 308, 310 (1975).

⁹³ See *Butz v. Economou*, 438 U.S. 478 (1978). See also *Carlson v. Green*, 446 U.S. 14 (1980).

⁹⁴ See *Butz v. Economou*, 438 U.S. 478, 496-508 (1978). Especially noteworthy is the Court's lengthy, and approving, quotation from Judge Leventhal's opinion in *Apton v. Wilson*, 506 F.2d 83, 93 (D.C. Cir. 1974), on the sufficiency of qualified immunity for Cabinet-level officials. 438 U.S. at 500 n.28. Four Justices, however, dissented on this point. *Id.* 517-30 (Rehnquist, J., concurring in part and dissenting in part, joined by Burger, C.J., Stewart, J., and Stevens, J.).

⁹⁵ *Halperin v. Kissinger*, 606 F.2d 1192 (D.C. Cir. 1979), *aff'd by an equally divided court*, 49 U.S.L.W. 4782 (U.S. June 22, 1981) (No. 79-880). Although the equally divided Court affirmed the D.C. Circuit's decision denying the President absolute immunity, the Court simultaneously granted certiorari in another case to examine whether the President was limited to the *Scheuer-Butz* qualified immunity. *Nixon v. Fitzgerald*, 49 U.S.L.W. 3946 (U.S. June 22, 1981) (No. 79-1738). Certiorari was also granted to review whether the lower courts' routine requirement of trial on the qualified immunity defense vitiated the defense. *Harlow v. Fitzgerald*, 49 U.S.L.W. 3946 (U.S. June 22, 1981) (No. 80-945). See also *Clark v. United States*, 481 F. Supp. 1086 (S.D.N.Y. 1979), *appeal dismissed*, 624 F.2d 3 (2d Cir. 1980).

made. The Court has restricted the circumstances in which it will accord legislators immunity, refusing to find legislators immune unless the challenged activity can be shown to have been not merely related to legislative activities but "essential to the deliberation" of the relevant legislative body.⁹⁶

Although the Court similarly has sought to confine judicial immunity to judges' judicial activities,⁹⁷ it has not been so restrictive in its view of what acts by judges qualify for absolute immunity. The Court's decision in *Stump v. Sparkman*⁹⁸ illustrates its relatively tolerant attitude toward judges. The Court in *Stump* reversed a decision of the U.S. Court of Appeals for the Seventh Circuit denying immunity to a judge who approved, on the day it was filed, a mother's petition to have her daughter sterilized. The appellate court found no arguable statutory basis for entertaining such a petition, much less for doing so without hearing from, appointing counsel for, or even notifying the minor girl.⁹⁹ The basis for the sterilization order was the mother's uncorroborated statement that her fifteen-year-old daughter was "somewhat retarded" and was associating with young men.¹⁰⁰ Despite the dissents of three Justices who argued that this was not in any meaningful sense a "judicial" act, that it was not within the judge's jurisdiction, and that without affording any of the normal protections of due

⁹⁶ See *Hutchinson v. Proxmire*, 443 U.S. 111, 130-33 (1979). See also *Davis v. Passman*, 442 U.S. 228 (1979); Comment, *Legislative Immunity and Congressional Necessity*, 68 Geo. L.J. 783 (1980). *Eastland v. United States Servicemen's Fund*, 421 U.S. 491 (1975), is an example of the less restrictive test for immunity of legislators that the Court used before these recent decisions. *Eastland* was a suit to enjoin enforcement of a subpoena by the Senate Subcommittee on Internal Security directing a bank to produce records concerning plaintiff organization's account. The Court found that the legislators' actions fell within the "sphere of legitimate legislative activities" and held that the speech or debate clause barred even injunctive actions relating to the legislature's investigatory powers. *Id.* 501-07. See also *Doe v. McMillan*, 412 U.S. 306 (1973); *United States v. Brewster*, 408 U.S. 501 (1972); *Dombrowski v. Eastland*, 387 U.S. 82 (1967); *United States v. Johnson*, 383 U.S. 169 (1966).

⁹⁷ In *Supreme Court of Virginia v. Consumers Union*, 446 U.S. 719 (1980), the justices of the Supreme Court of Virginia were found not to be acting as judges in promulgating and enforcing their state's Code of Professional Responsibility for attorneys. The U.S. Supreme Court held that the judges were not entitled to judicial immunity but instead were cloaked with legislative immunity in their promulgation of the Code and prosecutorial immunity in its enforcement. *Id.* 731-37. Damages were not at issue in this suit.

⁹⁸ 435 U.S. 349 (1978).

⁹⁹ *Sparkman v. McFarlin*, 552 F.2d 172 (7th Cir. 1977), *rev'd sub nom. Stump v. Sparkman*, 435 U.S. 349 (1978).

¹⁰⁰ The girl, told she needed an appendectomy, was operated upon shortly after approval of the petition and still without knowledge of it. The Court's opinion provides a more complete factual background. 435 U.S. at 351-53.

process it effectively cut off any other avenue of appeal,¹⁰¹ the Court upheld the judge's claim of immunity. The majority noted that the petition came before him because he was a judge, he sat in a court of general jurisdiction, and he was not acting in a personal, executive, or legislative capacity when he signed the order approving the petition; therefore, he was absolutely immune from damage liability under section 1983.¹⁰²

The Court has also reaffirmed and extended the immunity enjoyed by others connected with the judicial process or performing judicial functions. Prosecutors again were held immune from damage liability for initiating and pursuing criminal actions, regardless of motivation,¹⁰³ and the judicial immunity also has been extended to administrative officers who perform judicial functions. In *Butz v. Economou*, for example, the Court held that federal administrative hearing examiners as well as agency attorneys prosecuting an action before the examiners were absolutely immune from damage liability.¹⁰⁴ The same case held that the Cabinet officer to whom those officials reported and who was ultimately responsible for the decision at issue merited only a qualified immunity.¹⁰⁵ Justice Rehnquist, joined by three other Justices in dissent, commented:

If one were to hazard an informed guess as to why such a distinction in treatment between judges and prosecutors, on the one hand, and other public officials on the other, obtains, mine would be that those who decide the common law know through personal experience the sort of pressures that might exist for such decisionmakers in the absence of absolute immunity, but may not know or may have forgotten that similar pressures exist in the case of nonjudicial public officials to whom difficult decisions are committed. But the cynical among us might not unreasonably feel that

¹⁰¹ Justices Stewart, Marshall, and Powell dissented. *Id.* 364-69 (Stewart, J., dissenting, joined by Marshall & Powell, JJ.); *id.* 369-70 (Powell, J., dissenting).

¹⁰² *Id.* 356-64.

The five-Justice majority was not persuaded that the existence of explicit statutory provisions allowing sterilization of institutionalized persons, after administrative hearings of a specified nature and judicial review, placed a limit on the jurisdiction of Indiana judges to entertain sterilization petitions. *Id.* 358-59.

For a recent case more closely scrutinizing the "judicial" character of a judge's actions, and holding the judge liable for nonjudicial acts, see *Lopez v. Vanderwater*, 620 F.2d 1229 (7th Cir.), *cert. dismissed*, 101 S. Ct. 601 (1980).

¹⁰³ *Imbler v. Pachtman*, 424 U.S. 409 (1976), reaffirmed the result of *Yaselli v. Goff*, 275 U.S. 503 (1927) (*per curiam*). See note 65 *supra* & accompanying text. A similar immunity for administrative officers performing functions analogous to prosecutors was recognized in *Butz v. Economou*, 438 U.S. 478, 515-17 (1978).

¹⁰⁴ 438 U.S. 478, 508-14 (1978).

¹⁰⁵ See note 94 *supra* & accompanying text.

this is simply another unfortunate example of judges treating those who are not part of the judicial machinery as "lesser breeds without the law."¹⁰⁶

A possible basis for the distinction decried by Justice Rehnquist is examined in the next part. Even ignoring some possible costs of the Supreme Court's qualified immunity for executive officers, it is difficult to support fully the distinction drawn by the Court. That distinction becomes increasingly suspect when its effect on behavior of executive officials and the costs of administering the distinction are taken into account.

III. THE ROLE AND COSTS OF OFFICIAL LIABILITY

In moving from a two-tier immunity-privilege system to a one-tier qualified immunity system for executive officials, the Supreme Court has emphasized its concerns that government officials be constrained from inflicting harm on others and that the constraints not interfere with proper performance of official duties.¹⁰⁷ The Court has concluded that these concerns are harmonized by allowing liability except when the official has acted from acceptable motives and not far outside the desired range of performance.¹⁰⁸ Although it discussed the same concerns in cases involving legislators and judicial officers, the Court expressed the view that any liability-based constraint on their actions would entail costs (in less-than-optimal performance of their tasks) that exceed the beneficial effects of a liability constraint.¹⁰⁹

The concerns just noted are those addressed in tort litigation generally. Individual actions are presumed to respond to the actor's calculation of the costs and benefits of possible types of conduct.¹¹⁰

¹⁰⁶ 438 U.S. at 528 n.* (Rehnquist, J., concurring in part and dissenting in part, joined by Burger, C.J., Stewart, J., and Stevens, J.).

¹⁰⁷ See, e.g., *Carlson v. Green*, 446 U.S. 14, 18-23 (1980); *Butz v. Economou*, 438 U.S. 478, 497, 505-08 (1978); *Procunier v. Navarette*, 434 U.S. 555, 561-66 (1978).

¹⁰⁸ See, e.g., *Scheuer v. Rhodes*, 416 U.S. 232, 240-42, 247-48 (1974).

¹⁰⁹ See, e.g., *Butz v. Economou*, 438 U.S. 478, 508-17 (1978); *Stump v. Sparkman*, 435 U.S. 349, 356-64 (1978); *Doe v. McMillan*, 412 U.S. 306, 311-13 (1973).

¹¹⁰ See, e.g., W. BLUM & H. KALVEN, *supra* note 10; G. CALABRESI, *supra* note 8, at 68-75; Posner, *supra* note 8. This cost-benefit calculation can include personal views on the fairness of a contemplated action: if an individual has doubts about the fairness of an action, a decision to take that action imposes a cost (guilt?) on him; the feeling that he has done a "good deed," in contrast, confers a benefit on him. Cf. Landes & Posner, *Salvors, Finders, Good Samaritans, and Other Rescuers: An Economic Study of Law and Altruism*, 7 J. LEGAL STUD. 83, 93-100 (1977) (providing an economic model to determine when tort law will

The calculation may be sophisticated or unsophisticated—indeed, it need not involve conscious choice with respect to each act.¹¹¹ When there is reason to believe a class of actors will fail in their personal calculations to take sufficient account of the effect their actions have on others, damage liability presumptively can be used to induce a more socially acceptable calculus.¹¹² Provided that the improvement in behavior is valued more highly than the costs of obtaining it, liability will be appropriate. Otherwise, mechanisms other than liability must be trusted to secure the desired behavior.¹¹³ The questions posed by these concerns are: given some standard of desired behavior, what will damage remedies add to or detract from attainment of that behavior, and what costs will be incurred in order to accord the damage remedies? This part examines whether the solution reached by the Court meets the concerns articulated. Only the positive value of a damage remedy for official misconduct (what a damage remedy adds to attaining desired behavior) and the systemic cost of implementing such a remedy are examined. Thus, it is assumed in this part that no departure from desired behavior is induced by invocation of a damage remedy; that issue is addressed in part IV.

Analysis of the impact of damage remedies on future behavior and the systemic costs of applying them does not, of course, exhaust the list of possible inquiries respecting the propriety of affording damage relief against officials for their actions. One

encourage rescues). A somewhat different aspect of the interrelation of fairness goals with utility calculations is discussed in Henderson, *supra* note 8, at 1039-41.

¹¹¹ See, e.g., Blum & Kalven, *The Empty Cabinet of Dr. Calabresi: Auto Accidents and General Deterrence*, 34 U. CHI. L. REV. 239 (1967); Posner, *supra* note 8.

¹¹² This determination can be made either on the basis of some scheme for categorizing activities, see G. CALABRESI, *supra* note 8, at 135-97, or on individualized determinations that insufficient attention has been paid to particular costs, see Posner, *supra* note 8. Admitting the ability of individuals to make the sort of cost-benefit analysis presumed here does not, of course, necessarily mean that a similar cost-benefit analysis is feasible when the costs and benefits are imposed on different individuals. See Alchian, *The Meaning of Utility Measurement*, 43 AM. ECON. REV. 26 (1953); Epstein, *supra* note 9; Waldner, *The Empirical Meaningfulness of Interpersonal Utility Comparisons*, 69 J. PHIL. 87 (1972). But any process of social decisionmaking must (aside from the rare instances where "Pareto optimal" decisions are possible) find some means for basing social decisions on an assessment of the relative value of costs to one person and of benefits to another. This article does not suggest a mechanism for making this assessment.

¹¹³ See, e.g., Epstein, *Medical Malpractice: The Case for Contract*, 1976 AM. B. FOUNDATION RESEARCH J. 87. The point sometimes is framed by proposing for tort law the task of deterring certain types of harm while leaving to other means, legal and nonlegal, the task of accomplishing "aspirational" goals respecting human behavior. See J. HENDERSON & R. PEARSON, *THE TORTS PROCESS* 411-14 (1975) (materials concerning the absence of a general duty to rescue in American law). But see Landes & Posner, *supra* note 110.

could inquire whether it is fair to place the cost of official action on the officer or to leave it on the plaintiff.¹¹⁴ Or one could ask whether concepts of optimal allocation of resources, as well as fairness, support transferring the costs of official action from others to the public officer.¹¹⁵ By and large, however, the Court has not spoken in terms of fairness or other reasons unrelated to behavioral considerations for preferring compensation of plaintiffs, nor is it likely that such concerns would explain the different treatment of executive and judicial officials.¹¹⁶ Nonetheless, so that these concerns may be separated clearly from the issues addressed here, it will be assumed throughout this part and part IV that some other compensatory mechanism is available to persons harmed by official misconduct if the official is held immune.

A. Incentive Structures and Liability

The starting point for inquiry into the value of official liability to secure appropriate official behavior is examination of the ways that personal incentives (other than avoiding liability) can be structured into official positions. To this end, it is useful to divide official activities into four highly schematic categories. These categories describe different arrangements of nonliability incentives governing official behavior. In assigning activities to the various categories, the spectrum of effects of each activity is bifurcated into costs and benefits. These terms generally carry normative connotations: costs are bad effects; benefits are good effects. When referring to an individual's view, that is how these terms will be used. But what constitutes a "benefit" to one person may be a "cost" to another. From a social standpoint, as these terms are used in defining the different categories, costs and benefits may be viewed as normatively interchangeable terms; they represent opposing considerations in structuring any activity. To enable an activity to produce more of one good, some other good must be foregone or some risk of harm incurred. Either side of the equation may be labelled "cost" or "benefit" at this point so long as the opposite side receives the other label.¹¹⁷ At the socially optimal

¹¹⁴ See, e.g., Calabresi & Melamed, *supra* note 10, at 1093-1101; Epstein, *supra* note 9; Fletcher, *supra* note 9.

¹¹⁵ See G. CALABRESI, *supra* note 8, at 21, 39-67. See also Franklin, *supra* note 12.

¹¹⁶ *Stump v. Sparkman* is a particularly good illustration. See notes 98-102 *supra* & accompanying text. See also Rosenberg, *supra* note 29.

¹¹⁷ See Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 2, 19-28 (1960).

level, an activity's marginal costs and benefits will be equal: at that level, more of the activity will decrease socially valued goods and less of the activity would mean that additional socially valued goods could be obtained by increasing the activity.¹¹⁸

The four conceptually distinct categories are constructed on the basis of how personal costs and benefits of official decisions align with social costs and benefits. The categories are not descriptions of actual official actions but only abstract statements of the extremes possible in structuring individual officials' incentives. In this section, the effect of liability on the four hypothetical categories of activity will be considered. The next section evaluates the cost of imposing such liability standards. Although no official will fit these extreme cases, actual officials may be seen as more similar to one or another of these paradigms. Thus, section C uses these categories to classify actual official activities, suggesting the role liability might play in guiding each of these.

In category one, the official-actor personally bears all the costs and reaps all the benefits of his activity. The remaining three categories, unlike the first, involve activities the costs and benefits of which are shared by others in addition to the official. Moreover, in these categories, costs and benefits are not distributed evenly across the range of affected parties; instead, for each activity, one person or group of persons principally benefits from the activity while another person or group is disproportionately burdened with its costs. Although all three categories present this uneven allocation of costs and benefits, officials performing category two, three, and four functions differ in the way the terms of their employment induce them to take account of the interests of persons who are primarily beneficiaries of an activity and the interests of those who are primarily its costbearers. These differences in turn produce different likelihoods that activities in these categories will reflect the appropriate balance of costs and benefits. The activities comprising category two are those for which the official's job produces a personal cost-benefit calculus that leads the official systematically to favor some class of beneficiaries or costbearers in a manner inconsistent with the socially desirable result. In category three, the official's job is structured so that he has balanced incentives to consider the impact of his actions on both costbearers and beneficiaries. Category four is composed of activities for which the terms of an official's employment do not provide incentives to consider the activity's effect either on those who benefit or on those who bear its costs.

¹¹⁸ See P. SAMUELSON, *ECONOMICS* 495-98 (10th ed. 1976).

Category one, even more than the other hypothetical categories, is in reality an empty box. There are no activities within this category for which the official-actor personally bears the costs and reaps the benefits—in every case, there are external effects from official action. This category is included here, however, because it presents the limiting case for liability. If the actor and no one else is directly and immediately affected by his acts, he has all the incentives necessary to adjust the activity to produce the optimum level of costs and benefits. This does not mean that the official will never err in his attempts to strike the balance of costs and benefits. It does mean that a damage penalty for errors would not improve the official's incentives to perform his task properly. This category can be made more realistic by positing that the activities do result in external effects on some person or group of like persons, but that each cost bearer is simultaneously a beneficiary. So long as the costs and benefits are distributed in tandem, damage liability will not improve incentives for optimal behavior.

Category two is at the opposite extreme. Personal incentives are arrayed in a manner that is apt to produce consistent departures from optimal behavior because the official is encouraged by them to consider only one set of costs or benefits. Some monetary penalty for activity that imposes too many costs on society or that produces too few benefits could help balance the official's incentives. At the appropriate level, this penalty would, together with the official's other incentives, produce conduct that did not systematically depart from the ideal balance of social costs and benefits. Again, even with this penalty counterbalancing the nonliability incentive structure, some deviation from an objectively determined ideal will occur because the official has only limited powers of rationality—absent perfect officials, there always will be mistakes.

Categories three and four present intermediate cases. In category three, the official has balanced incentives to consider both costs and benefits. In contrast to category one, costbearers and beneficiaries are different classes of people. The official, consequently, will be more likely than one performing a category one activity to produce too few benefits or too many costs. The official may feel more favorably inclined to one class than to another, for instance, because of some personal affinity for that class (independent of incentives defining a category three position) or because that class has invested resources effectively in convincing the official that an outcome it favors does in fact harmonize costs and benefits. Even so, unlike category two, the likelihood of systematic errors in one di-

rection is low—the incentives to consider both types of effects are relatively balanced and the resultant decisions should reflect that balance.

Category four presents a clearer case for liability than do categories one or three. Absent incentives to consider costs or benefits, the official might reach any result, near or far from the desirable outcome. Across a range of category four decisionmakers, one would not expect the sort of systematic bias in outcomes that category two would produce. Because the activity's incentive structure does not bias the official in one direction, any alignment of the official's personal costs and benefits with either costbearers or beneficiaries will be fortuitous and can shift from decision to decision. The problem in category four activities is not that the official is biased, but rather that the official may be uninterested. Absent incentives to consider either social costs or benefits, the official might always act in a way inconsistent with the social optimum (though the direction and magnitude of his departures will not be predictable). If category one presents the case in which all costs and benefits are internalized and liability therefore is unnecessary, category four presents the case in which no costs or benefits are internalized and liability, if available, will provide the only institutional incentive to socially optimal official behavior. Under these circumstances, liability may be useful, but if the classes of costbearers and beneficiaries are not equally willing or able to prosecute lawsuits, liability could skew the performance of category four activities in the same manner that nonliability incentives skew category two actions.

B. *The Cost of Adjudicating Liability*

The prior section evaluated the usefulness of a damage penalty for failure to perform properly official activities of four highly stylized types. No mention was made of the cost of formulating a standard to guide imposition of a damage penalty or of the cost of implementing that standard. The impact of these process costs on the four categories of official activity is considered in this section. Part IV takes up the impact of a second cost: increased performance errors resulting from liability.

Damage liability was found to be unnecessary to improve incentives of officials in category one. The existence of any cost for imposition of liability renders it unwise as well as unnecessary because resources would be consumed without social gain. Given

the patent disutility of liability for category one activity, this category will not be discussed further.

Category two presented the extreme case for liability in a world where it could be imposed at no cost. Obviously, however, imposition of liability is not costless in the real world. Any gain in better performance as a result of liability will have to be measured against its cost. The major elements determining the costs of imposing liability are the clarity with which the standard of desirable performance can be defined and the ease with which departures from that standard can be identified.

Some elaboration of the sort of actions that comprise category two is necessary in order to evaluate these costs. Before doing that, one caveat is in order. In drawing separate categories of official activity so starkly, the different impact of personal liability can be seen, but only at the expense of some clear sense of actual activities that might correspond to the categorization. Rather than officials with incentives to respond wholly to one concern and not at all to the other (or to respond equally to both), the reality is likely to be officials who have significantly greater incentives to respond to one concern or relatively balanced incentives to consider opposing interests. The illustrations of category two, three, or four activities given in this section depart from the all-or-nothing definitions given in section A, and at the same time continue to abstract from a reality in which it is terribly difficult to determine what incentives guide a particular type of official in performing a specific task. In section C, an attempt will be made to integrate the conduct for which damage awards have been sought with the categories given here. For the moment, the examples are consistent with one party's view of the official's incentives but are not offered as factually correct.

With this caveat, a variety of official activities might be analogous to category two. Officials of the Food and Drug Administration (FDA) passing on applications for authority to market new drugs, for example, may be averse to adverse publicity from approval of dangerous drugs. By setting up careful, but time-consuming and costly screening procedures for testing new drugs, the FDA can reduce the chances that a drug later found to be dangerous will be approved for human use. Those who might have been prescribed a dangerous drug and who are susceptible to its dangers would be beneficiaries of such procedures. These procedures, however, will delay or prevent the marketing of beneficial drugs as well, and will increase the price of all new drugs. Producers, con-

sumers, and a second class of potential consumers (who would have benefited from drugs not available to them) share the costs of procedural delays. Harm to these costbearers will be less obvious than harm to the beneficiaries would be. The officials thus have a strong incentive (fear of adverse publicity) for maximizing benefits of drug screening, while incentives to reduce the costs of such screening are weaker.¹¹⁹

Police officers may have similarly imbalanced incentives. The benefits from arresting persons who may commit or may have committed crimes accrue to the members of the community who are potential victims of those crimes. Community members influential in structuring the local government may ensure that more immediate benefits accrue to the chief of police, and in turn to his subordinates, from higher arrest rates and higher "solved" rates. One of the costs from increased arrests will be an increase in the number of persons wrongfully arrested, because arrests will always be made on the basis of imperfect information, and an increase in arrests (other things being equal) will entail a reduction in the quantum of information required to make an arrest. Police officers, however, may be relatively unconcerned about this cost of increased arrests, especially if it is borne by individuals who, because of past criminality or other characteristics that are disfavored by police, are deemed undesirable.¹²⁰

Neither of these activities admits of a precise, easily administrable performance standard. It is difficult to specify the quantum of evidence that should be necessary to arrest, or the probabilities of benefit and of risk that should prompt licensing of a new drug.

¹¹⁹ *United States v. Rutherford*, 442 U.S. 544 (1979), and its procedural history, *see id.* 548-51, provide an excellent illustration of the "new drug" procedures utilized by the FDA. Interesting discussions of the social impact of drug laws and FDA action can also be found in M. SHAPO, *A NATION OF GUINEA PIGS* (1979); Merrill, *Compensation For Prescription Drug Injuries*, 59 VA. L. REV. 1 (1973); Peltzman, *An Evaluation of Consumer Protection Legislation: The 1962 Drug Amendments*, 81 J. POL. ECON. 1049 (1973); Seidman, *The Politics of Policy Analysis: Protection or Overprotection in Drug Regulation?*, 1 REC. 22 (Jul./Aug. 1977).

¹²⁰ *Cf. Pierson v. Ray*, 386 U.S. 547, 557 (1967) (allegations that police were responsive to white businessmen in arresting blacks for disturbing the peace by patronizing segregated establishments, but were unconcerned with imposition of costs on arrestees); *Norton v. McShane*, 332 F.2d 855 (5th Cir. 1964) (allegations that at time of a highly publicized controversy concerning admission of the first black student into the University of Mississippi, federal law enforcement officials arrested and mistreated plaintiffs without reasonable basis for believing the arrestees were involved in violent resistance to integration), *cert denied*, 380 U.S. 981 (1965).

This skew also may be reflected in other police conduct short of arrests, such as searches for incriminating evidence. *Cf. Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971) (allegations that federal agents made a warrantless entry and search of plaintiff's apartment).

There are, however, limits that can be drawn around the range of permissible performance at relatively low cost. Some ground for suspicion beyond a previous arrest record for generally similar crimes, for instance, could be required of the police officer. That standard could be enforced without great difficulty, although it might well allow considerable scope for departure from the ideal.¹²¹ The police officer at least is engaged in conduct that does not differ greatly from the run of private conduct constrained by tort rules, although the occasion for engaging in that conduct does. There is a larger difference between private activities and the activities of an FDA official, and any standard constraining him risks departing from congressional intent in creating the FDA unless Congress clearly specifies the considerations that should underlie a decision to grant or withhold a license to market new drugs.¹²²

Even here, of course, some general limits can be articulated. Although it is difficult to determine whether drugs are efficacious and whether they are dangerous, the religious preferences of the drug's marketer will rarely bear on either of these questions. More generally, there is no reason to believe someone who is disliked by the FDA official for reasons unrelated to the qualities of the drug he proposes to offer for sale should be supposed less likely than anyone else to be promoting a valuable new drug. Limiting official action by penalizing these sorts of discriminations operates to check a different kind of official error than is discussed above. The first sort of error may be labelled a "performance error." The type described in this paragraph may be called an "intent error." The official commits a clear intent error when he knowingly acts to disadvantage someone on bases unrelated to his assigned task.¹²³

While standards respecting intent errors are more easily stated than standards respecting performance errors, they are not necessarily easier to administer. In many cases, the difficulty of judging performance makes ascertaining intent errors difficult as well. Suppose FDA Commissioner Jones denies a new drug license to Booker Pharmaceuticals. Booker sues claiming that its application was denied because the firm is wholly owned by blacks and Commissioner Jones discriminates against blacks. Commissioner Jones

¹²¹ Cf. C. WHITEBREAD, *CRIMINAL PROCEDURE* §§ 3.01-.07 (1980) (discussing the contours of the law of arrest).

¹²² Cf. R. MERRILL & P. HUTT, *FOOD AND DRUG LAW* 369-439 (1980) (discussing the new drug licensing process, including the difficulties encountered in that process and criticisms of it).

¹²³ Allegations of intent error are not uncommon in damage suits against officials. See, e.g., *Butz v. Economou*, 438 U.S. 478, 481-83 (1978).

denies the allegation; he recounts the various percentage probabilities of different maladies resulting from the Booker drug and also recounts the grounds for concluding that the drug is not efficacious. The reasons for denying the license, on performance grounds, are based on extrapolations from experiments having no direct correlation with the drug's behavior in humans in recommended doses. There are no drugs for which the data yielded by experiments are identical to those for the Booker drug. Absent direct information concerning Commissioner Jones's intent or a series of relatively similar sets of circumstances from which one could draw an intuitive "regression analysis" to determine if the applicant's race seemed to be the decisive factor, it is difficult to assess the claim of intent error.¹²⁴

The difficulties of assessing both performance and intent errors are even greater in categories three and four than in category two. Category three activity, for which an official has nonliability incentives to respond both to interests in increasing benefits and to interests in reducing costs, is illustrated by the following situation. A legislator must vote on a bill to impose a substantial tax on the sale of fossil fuels. His constituents for the most part are either engaged in some aspect of the oil industry or in mining and purifying uranium for nuclear power plants. The costs of the tax will be borne in large measure by those with interests in oil, while the benefits will go substantially to those in the nuclear fuel industry. Both groups are likely to be influenced in their choices among competing candidates in the upcoming election by the current representative's vote on this issue. Each group will provide the legislator with information on the proposed tax's impact on society; each group will argue that the result it favors will benefit society generally. The amount each group spends on this effort, on supporting or opposing the representative in the next electoral campaign, or on similar activities, is in large measure influenced by the size of the group's gain or loss from enactment of the legislation.¹²⁵ In responding to the interests of these groups, the legislator arguably harmonizes social costs and benefits.¹²⁶ Indeed the legitimacy of

¹²⁴ The difficulty of policing FDA decisions on new drugs is indicated by the fact that there has been no successful challenge to an FDA refusal to license a new drug. R. MERRILL & P. HUTT, *supra* note 122, at 415. See also *id.* 404-15 (collecting materials).

¹²⁵ See Barro, *The Control of Politicians: An Economic Model*, 14 PUB. CHOICE 19 (1973); Crain & Tollison, *Campaign Expenditures and Political Competition*, 19 J.L. & ECON. 177 (1976); Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MANAGEMENT SCI. 3 (1971).

¹²⁶ The legislator, of course, need not intend that result. An intent to remain in office or to accomplish some other personal goal is consistent with socially bene-

these pressures is unquestioned; the legislator is expected to respond to them, making the formulation of a standard delineating impermissible pressures extremely difficult.

Many other official actions also could be analogized to category three. Commissioners of regulatory agencies chiefly concerned with regulation of competing industries might engage in activity allocable to category three when deciding what rules should govern that competition;¹²⁷ zoning board members planning future growth patterns similarly might fit this pattern,¹²⁸ as might a supervisor evaluating employees for promotion.¹²⁹ None of these activities, of course, will necessarily be governed by incentives to balance appropriately both costs and benefits, but each could be.

The costs of evaluating category three decisions are likely to be quite high. What, for instance, is the standard by which to judge the propriety of imposing a tax on fossil fuel sales? Many activities that resemble category three are ones for which articulation of performance standards, other than in conclusory terms, is very difficult. The legislator, for example, is asked to determine which course of action among many best harmonizes costs and benefits. For those parties whose interest in the decision is strong enough, there will be ample incentive to provide information (or misinformation) supporting the position they favor; yet, it may be extremely difficult to evaluate this information in the context of a legislative information-gathering process. Furthermore, the legislator is answerable in some degree to many persons who are neither burdened nor benefited sufficiently by any course of action to warrant the costs of making their views known, but who nonetheless may be affected by the decision.¹³⁰ Assessing the interests of these persons may be even more costly than analyzing the accuracy

ficial conduct, given the distribution of incentives described in the hypothetical. See, e.g., Crain & Tollison, *Attenuated Property Rights and the Market for Governors*, 20 J.L. & Econ. 205 (1977).

¹²⁷ Cf. *Home Box Office, Inc. v. FCC*, 567 F.2d 9 (D.C. Cir.) (per curiam) (reviewing FCC rules restricting cable television), *cert. denied*, 434 U.S. 829 (1977). The process by which the FCC reached its decision reviewed in *Home Box Office* is related in Gellhorn & Robinson, *Rulemaking "Due Process": An Inconclusive Dialogue*, 48 U. CHI. L. REV. 201 (1981).

¹²⁸ Cf. *Gorman Towers, Inc. v. Bogoslavsky*, 626 F.2d 607 (8th Cir. 1980) (granting immunity to local officials enacting zoning laws); *Just v. Marinette County*, 56 Wis. 2d 7, 201 N.W.2d 761 (1972) (upholding shoreland zoning ordinances). See also Sax, *Takings, Private Property and Public Rights*, 81 YALE L.J. 149 (1971).

¹²⁹ Cf. *Gordon v. Adcock*, 441 F.2d 261 (9th Cir.) (immunizing superior officer in air force from suit despite his negative evaluation of applicant), *cert. denied*, 404 U.S. 833 (1971).

¹³⁰ See, e.g., Stigler, *Economic Competition and Political Competition*, 13 PUB. CHOICE 91 (1972).

of information brought to the legislator's attention: costlier still would be a determination of whether the legislator had fairly assessed those interests.

Legislators are enjoined to follow perhaps the least specific of any performance standard: they are directed to harmonize social costs and benefits without any articulation of the values by which costs and benefits are to be judged. The network of constraints to which they are subject—including their party affiliation, their desire to secure votes and campaign contributions for purposes of re-election, and their ambition for higher office or for secure and remunerative future employment—may operate quite imperfectly to give legislators real incentives to strike the cost-benefit balance properly.¹³¹ Highly valued concerns of minority interests or concerns very widely shared that in the aggregate are of enormous social value may not receive adequate consideration by any given legislator or by all legislators.¹³² Nonetheless, constructing a standard by which to judge their performance requires some clear notion of the manner in which the social balance should be struck. In large measure, our system of governance makes the result of legislators' performance the determinant of how social concerns are balanced.¹³³ To the extent the Constitution limits legislative freedom, it does so through imprecise statements that require, as well as embody, additional balancing.¹³⁴ It seldom provides clear performance standards. Almost any constitutional decision picked at random from opinions of the Supreme Court is illustrative: if, for instance, fiscal concerns merit restriction of federal retirement benefits, are due process concerns sufficient to tilt the social balance against such restrictions?¹³⁵

The difficulty of assessing performance of legislative tasks and of other, similar activities that might resemble category three supports limitations on the scope of inquiry into such decisions. This is consistent with the grant of considerable discretion to officials performing category three functions. Even outside the legislative

¹³¹ There is substantial literature on the operation of democratic decision-making processes focused on the incentives of individual actors. Readable explications of "public choice theory" include J. BUCHANAN & G. TULLOCK, *THE CALCULUS OF CONSENT* (1962); M. OLSON, *THE LOGIC OF COLLECTIVE ACTION* (1965); W. RIKER & P. ORDESHOOK, *AN INTRODUCTION TO POSITIVE POLITICAL THEORY* (1973).

¹³² See authorities cited in note 131 *supra*; Stigler, *supra* note 125.

¹³³ See generally A. BICKEL, *supra* note 23, at 16; J. ELY, *supra* note 23, at 87; L. HAND, *THE BILL OF RIGHTS* 1-30 (1958).

¹³⁴ See, e.g., Henkin, *Infallibility Under Law: Constitutional Balancing*, 78 COLUM. L. REV. 1022 (1978).

¹³⁵ See *United States R.R. Retirement Bd. v. Fritz*, 101 S. Ct. 453 (1980).

sphere, such officials often are freed from requirements that they rely upon information presented by the participating parties or that they rigorously justify a choice to shape their action in one fashion rather than another.¹³⁶ More than the most general review of these actions would require some other official to replicate the exercise of judgment either at greater cost (in obtaining and verifying information) or on similarly ambiguous and perhaps untrustworthy information. Only greater respect for the second official's judgment would seem to justify significant review of category three actions. Were the latter official's judgment more valued, might it not be better for him simply to replace the first?

Review of category four decisions presents difficulties similar to those encountered in category three. Activity analogous to category four might be the work of a federal judge disposing of a petition, ruling on motions, or rendering judgment in a suit. For any decision, one of the litigants will bear the costs, the other will benefit; the litigants will often represent (formally or informally) those classes who will similarly bear the costs or reap the benefits.¹³⁷ As with lobbying and related functions, the expenditures of each group on litigation will be determined in part by the value of a particular outcome to that group.¹³⁸ Even if the investment in litigation resources were proportional to anticipated gains or losses, however, judges lack any significant incentive, intrinsic to the judicial process, for responding to the parties' (and ultimately the society's) interests in minimizing costs on the one hand and maximizing benefits on the other. The salaries of the judges are not adjusted upward or downward according to the extent to which

¹³⁶ See, e.g., 5 U.S.C. §§ 553, 706 (1976) (provisions of Administrative Procedure Act providing for rulemaking and judicial review); *Kendler v. Wirtz*, 388 F.2d 381 (3d Cir. 1968). The rules governing "scope of review" of administrative actions, if not the judicial implementation of those rules, appear designed, *inter alia*, to preserve room for discretion in the exercise of category three activities. For two views of this area, see the discussion in L. JAFFE, *JUDICIAL CONTROL OF ADMINISTRATIVE ACTION* 546-623 (1965), and materials collected in J. MASHAW & R. MERRILL, *INTRODUCTION TO THE AMERICAN PUBLIC LAW SYSTEM* 785-808 (1975).

¹³⁷ See Landes & Posner, *Adjudication as a Private Good*, 8 J. LEGAL STUD. 235, 236-59 (1979). Although the immediate parties to a suit are likely to be most affected, and where interests of others are substantially at stake a variety of devices (class actions, joinder rules, estoppel rules, amicus participation) will allow them either to participate in the litigation or be protected against undue effect by its outcome, suits nevertheless may affect numerous nonparticipants. See, e.g., Landes & Posner, *Legal Precedent: A Theoretical and Empirical Analysis*, 19 J.L. & ECON. 249 (1976).

¹³⁸ Although once a contest is begun, the values of the cost to one side and the benefit to the other may be largely equivalent, they need not be identical. See notes 170-92 *infra* & accompanying text.

they minimize costs, maximize benefits, or harmonize the two.¹³⁹ Nor, at least with federal judges, is their job tenure imperilled or enhanced by their decision. Finally, judges need not be concerned about the reactions of the parties before them. It certainly is the common expectation that judges will not receive incentives to decide one way or the other directly from parties to the case.

The absence of direct incentives to adjust costs and benefits does not mean, of course, that socially disfavored action will result. To the contrary, it has been argued that decisions of Anglo-American judges tend to strike the balance of social costs and benefits fairly well and that decisions to the contrary do not long survive.¹⁴⁰ Enhancing a judge's reputation among scholars or lawyers, reducing the likelihood of reversal (for judges of lower or intermediate courts), and limiting criticism by legislators and citizens have been given as reasons judges might reach appropriate solutions despite the absence of direct incentives.¹⁴¹ Ideally, these indirect (noninstitutional) incentives give judges the same impetus to balance social costs and benefits that a hypothetical category three actor would have. To perform this function, these incentives must focus less on the problem of individual erroneous decisions—ones that depart from the social ideal—than on the seriousness with which the judge takes his task. The greatest penalties, thus, are reserved for the judge who refuses to work or who is positively arbitrary in his decisions rather than for the judge whose elaborately

¹³⁹ The legislature might refuse to raise judges' salaries to keep pace with inflationary decreases in the value of money. See *United States v. Will*, 101 S. Ct. 471 (1980); *Atkins v. United States*, 556 F.2d 1028 (Ct. Cl. 1977) (per curiam), cert. denied, 434 U.S. 1009 (1978). Because the legislature must decide for all judges at one time whether to increase judicial salaries, and because any determination respecting consistency with social good would thus require review of many individual decisions, it is most unlikely that even this potential for control over judges' incomes will translate into any direct incentive to reach a particular outcome in a given case.

¹⁴⁰ See Goodman, *An Economic Theory of the Evolution of Common Law*, 7 J. LEGAL STUD. 393 (1978); Priest, *Selective Characteristics of Litigation*, 9 J. LEGAL STUD. 399 (1980); Priest, *The Common Law Process and the Selection of Efficient Rules*, 6 J. LEGAL STUD. 65 (1977) [hereinafter cited as Priest, *The Common Law Process*]; Rubin, *Why is the Common Law Efficient?*, 6 J. LEGAL STUD. 51 (1977).

¹⁴¹ E.g., R. POSNER, *ECONOMIC ANALYSIS OF LAW* § 19.7 (2d ed. 1977). The argument also is made that parties will have incentives to relitigate incorrect legal rules, ultimately arriving at rules that (because efficient) will not need repeated litigation. See Priest, *The Common Law Process*, supra note 140, at 73-75; Rubin, supra note 140, at 53-57. A different argument reaching the same result is that even if litigation is randomly generated, differential expenditures in influencing the outcome will favor creation of efficient rules. Goodman, supra note 140, at 394-405. This latter argument, however, rests on assumptions (such as that litigants' expenditures will be roughly congruent with social interests in the outcome) that are not free from serious question.

reasoned opinion, replete with citations, reaches an outcome widely perceived to be incorrect.

Whether officials performing category four activities arrive at socially valued solutions frequently or seldom, the cost of assessing liability for their decisions is likely to be greater than in most other situations. The isolation of these officials from the pressure of interested groups reflects a belief that those groups alone cannot adequately represent societal interest.¹⁴² Not infrequently, difficult decisions must be rendered on the basis of complex, ambiguous, or conflicting information. In determining whether an error was made and assessing liability for it, the same difficult decisions must be repeated. If they are to be of greater accuracy than the initial decision, these decisions must be accompanied either by better information than was initially available or by better mechanisms for weighing and sifting information used initially.¹⁴³ Imagine, for instance, a judgment in a complicated securities or antitrust case being reviewed for error to determine whether the trial judge should be liable in damages. The issues litigated initially would have to be reexamined in a trial setting with its attendant complex of procedures for eliciting and evaluating information.¹⁴⁴ Repeated trials of the same issue would become phenomenally costly. That is one reason why superior courts (at least ostensibly) review a narrower range of issues than do the inferior courts.¹⁴⁵ The availability of nonliability review mechanisms, of course, reflects concern over the initial decisionmaker's likelihood of ascertaining the

¹⁴² See Landes & Posner, *The Independent Judiciary in an Interest-Group Perspective*, 18 J.L. & ECON. 875 (1975).

¹⁴³ Generally, in reviewing judicial decisions, more information will not be considered nor will more elaborate means be employed for testing the veracity of information that may be subject to confirmation or rejection. In the context of ordinary judicial review, however, the superior court judges are viewed as a "better mechanism" for evaluating the relevant information; better, if not in some easily definable skill, at least in the predicted consonance of their judgments with legislative and executive determination of what is social good.

¹⁴⁴ In damage actions against officials, the seventh amendment's guarantee of the right to jury trial is likely to produce this result even if less complex mechanisms for evaluating the information are available. Tort actions for damages will, under the current view of the seventh amendment, give plaintiffs and officials the right to demand a jury trial with its attendant procedures and costs. See McCormack, *Federalism and Section 1983: Limitations on Judicial Enforcement of Constitutional Protections, Part I*, 60 VA. L. REV. 1, 66-70 (1974). But see *In Re Japanese Electronic Products Antitrust Litigation*, 631 F.2d 1069 (3d Cir. 1980).

¹⁴⁵ See, e.g., *Yale v. National Indemnity Co.*, 602 F.2d 642 (4th Cir. 1979); *United States v. Smith*, 523 F.2d 771 (5th Cir. 1975), *cert. denied*, 429 U.S. 817 (1976); *Jenkins v. Louisiana State Bd. of Educ.*, 506 F.2d 992 (5th Cir. 1975); *Brennan v. Midwestern United Life Ins. Co.*, 417 F.2d 147 (7th Cir. 1969), *cert. denied*, 397 U.S. 989 (1970).

best outcome. At the same time, availability of these mechanisms reduces the likely damage from erroneous initial decisions and offers a lower-cost alternative to liability for correcting them.¹⁴⁶

C. *The Court's Assessment of the Cost of Formulating Liability Standards*

If the analysis of individual officer liability stops at this point, still constrained by the assumption that compensation is available from other sources and only taking cognizance of the general deterrent utility of such liability and one of its costs (the systematic cost of formulating and applying liability rules), the result reached is broadly consistent with the pattern of Supreme Court decisions. The one-cost model developed thus far suggests that no liability should be imposed for category three or four activities because the gains from such alteration of incentives as liability may produce will be slight and the costs of replicating these decisions generally will be great. Development of performance standards that provide significant guidance to operating officials or to their reviewers will be extremely difficult in these categories, and the construction and implementation of performance standards for them will be costly. Checking intent errors, while less costly, also will be difficult for category three and four conduct, a difficulty derived from the problem of specifying performance standards. For category two activities, the gains from using personal liability are greater and the costs of reviewing these decisions frequently are less. Nonetheless, creation and application of precise performance standards for these activities will be costly. Allowing some range of tolerable performance within which no penalty attaches would seem to be a suitable compromise, securing a beneficial counterweight to imbalanced incentives without necessitating undue cost.

The costs of formulating even these flexible performance standards still may be high. It may, and undoubtedly would, be extraordinarily difficult to calibrate the standard and the magnitude of the damage penalty so as to create a counterweight of correct proportion to balance each official's incentives. Yet, the one-cost model would support making that effort for category two activities.

The separation of activities among the various categories also may prove difficult. How, for example, would an agency director's issuance of a press release about two employees, the conduct at

¹⁴⁶ Unlike liability, of course, judicial review does not *prevent* errors except insofar as lower court judges (or analogous officials) correctly predict the likelihood of reversal and adjust their behavior accordingly.

issue in *Barr v. Matteo*,¹⁴⁷ be characterized? To ascertain the appropriate category to which a given official action should be analogized requires consideration of the specific incentives provided an official in performing the activity at issue. In each case, it must be asked how the official's performance of that activity is likely to be affected by such incentives as income, chance of promotion, job assignments, the difficulty, duration, or pleasantness of his work, or other avenues for gratification. Although a few official actions may admit of easy categorization, it will require considerable information to answer this question with respect to most officials, information that is likely to be quite costly to acquire and evaluate.

There have been various attempts in the legal literature to divide official actions along lines that permit easier identification.¹⁴⁸ Each of these alternative classification schemes may be viewed as an attempt to identify the incentives controlling broad areas of

¹⁴⁷ 360 U.S. 564 (1959). See notes 69-73 *supra* & accompanying text.

¹⁴⁸ In the official liability area, two serious attempts at categorization have been made, by Professors Epstein and Mashaw. Epstein divides official action, or more precisely tort suits challenging official action, into three categories: (1) actions affecting "passive plaintiffs"; (2) actions affecting "participating plaintiffs," and (3) "quasi-judicial" actions, which include licensing, prosecutorial decisions, and actions by school teachers and judges. Epstein would grant no immunity to officials whose actions affect individuals whether unwillingly or willingly involved, although he would use a strict liability standard for the former group of cases and a negligence (or similar) standard for the latter. Epstein, *supra* note 29, at 55-58. For the third group of actions, Epstein would confer some immunity on the defendants, reasoning that if there were a private law analogue, that result would be reached by contract. *Id.* 58-63. Because there is a private law analogue for school teachers without any evidence of contractual waivers of students' or parents' rights to sue in tort, Epstein's argument appears curious. One might, however, reformulate Epstein's explanation for his categories in more persuasive fashion by noting that where plaintiffs are not participants in the activity concerned their interests are less likely to be considered carefully by the actor than where the plaintiffs are in a consensual relationship with the official-actor; hence, there is greater need for liability in the first case than in the second. Cf. Epstein, *supra* note 113 (arguing the case for private contractual control over medical malpractice). For the final "quasi-judicial" category, Epstein might be trying to identify those cases where liability is inappropriate because the official's incentives to good behavior are, generally, adequate. See Epstein, *supra* note 29, at 62-63. Yet Epstein's categories cannot without difficulty be made to match up with any realistic appraisal of officials' incentives.

Mashaw's categorization divides officials' actions into four categories: (1) enforcement; (2) authorizations; (3) grants and benefits, and (4) proprietary functions. Mashaw, *supra* note 29, at 10-14. Having thus divided official actions, however, Mashaw makes no further use of the divisions except to note that the current imbalance in available causes of action may lead to a skew in suits concerning, and hence in performance of, enforcement activity. *Id.* 29-31. Although one might attempt to align Mashaw's categories with some assessment of nonliability incentives to good performance, it is difficult to fit those two schemes together. Enforcement activities may be ones for which incentives are frequently imbalanced; that may not be the case with authorizations. More likely, each of Mashaw's categories will encompass some officials who enjoy, and others who lack, ample nonliability incentives to good behavior.

official conduct.¹⁴⁹ Unfortunately, the vast numbers of different persons and actions covered by each classification prevents the classes of conduct identified by such schemes from correlating well with the nonliability incentives actually faced by officials.¹⁵⁰

Even so, it seems plausible to analogize at least "core" legislative activities to category three and "core" judicial activities to category four.¹⁵¹ The court's refusal to allow official liability for these activities, whether for performance errors or for intent errors, and even under a statute that on its face creates no exemptions from liability, then, would strike the balance properly.¹⁵² Similarly, it is plausible to analogize a wide range of executive functions to category two. *Pierson v. Ray*¹⁵³ provides a good example. Police officers in Mississippi at the time that case arose were sensitive to the concerns of white businessmen but not to the interests of blacks in being served by those businesses without risking arrest. Executive functions that are fairly easily analogized to category

¹⁴⁹ Writings unconcerned with official liability have been more explicit in attempting to distinguish situations differing one from another in the incentive structure governing particular types of behavior. Professor Macneil's tripartite division for contract law, for instance, identifies classes of dealing where parties' relationships (and incentives to engage in activity maximizing their joint, as opposed to individual, product) might be expected to differ. See Macneil, *Contracts: Adjustment of Long-Term Economic Relations Under Classical, Neoclassical, and Relational Contract Law*, 72 Nw. U.L. Rev. 854 (1978). Professor Williamson has followed Macneil's work with an article focusing on the peculiar incentives that appear in certain relationships that give rise, because of the existence of particularized information that cannot be obtained costlessly, to occasions for "opportunistic" behavior. Williamson, *Transaction-Cost Economics: The Governance of Contractual Relations*, 22 J.L. & Econ. 233 (1979). A similar focus has informed some writings on the theory of the firm, see Fama, *supra* note 27; Jensen & Meckling, *supra* note 27, and on torts, see Shavell, *Strict Liability versus Negligence*, 9 J. LEGAL STUD. 1 (1980). These authors, too, have had difficulty finding factors that can separate instances where the various incentives to socially optimal behavior work well from those where they work poorly. Factors such as the duration of a relation (long-term, short-term, single-event), its consensual or nonconsensual nature, the number of parties involved, or the opportunity for duplicating the relation with different parties may affect the governing incentive structure. To date, however, these or other relevant factors have not been organized in a theory that allows meaningful identification of distinct categories of activity according to the likelihood that socially desirable outcomes will result.

¹⁵⁰ In part, the difficulty of aligning activities with incentives is attributable to the difference an individual's *position* in government (or any enterprise) will make to his incentives in respect to what may appear to be a single activity whether performed by high-ranking or low-level officials. See text accompanying notes 156-59 *infra*.

¹⁵¹ Plainly, not all functions performed by legislators or judges would qualify as analogous to categories three or four. For a classic category two activity that might be labelled "judicial," see *Tumey v. Ohio*, 273 U.S. 510 (1927) (invalidating legal proceedings in which the adjudicating official received a share of the fines levied against persons convicted of offenses).

¹⁵² See *Pierson v. Ray*, 386 U.S. 547, 553-55 (1967); *Tenney v. Brandhove*, 341 U.S. 367 (1951).

¹⁵³ 386 U.S. 547 (1967). See notes 74-81 *supra* & accompanying text.

two, notably those performed by police and prison officials,¹⁵⁴ are usefully checked by liability for either significant performance errors or for intent errors. The good faith and reasonable grounds defense of *Pierson* and *Scheuer v. Rhodes*,¹⁵⁵ which now is applicable to all executive officers save those clearly connected with "judicial" tasks, seems designed to give liability for these officials the contours suggested thus far for category two.

While the Court and one-cost model are thus generally in accord, the Court's uniform treatment of all executive officers sweeps into the qualified immunity fold officials whose activities seem to be more closely analogous to category three or four than to category two. The conduct in *Pierson* may be thought to fit category two fairly well, but what of the acts at issue in *Scheuer*? Among the allegations of the *Scheuer* complaint were that the Governor of Ohio called out the National Guard unnecessarily and that he and the Adjutant General of the Ohio National Guard did not ensure that Guard members were adequately prepared to handle an emergency without use of lethal force.¹⁵⁶ It is difficult to argue convincingly that the chief executive of a state has inadequate incentives to weigh the benefit in protection of persons and property against the possible cost in injury or loss of life when he decides whether to call out the National Guard. The governor of a state is a person of great public visibility; most of his official activities are scrutinized by the press and by interested individuals. He likely will be asked to account both for injuries resulting from failure to call out the National Guard to control a volatile situation and for injuries resulting from actions of the Guard. Even if he is not eligible for or interested in reelection, the Governor is likely to be concerned (whether for the sake of his reputation or for the sake of his party's candidates in the coming election) with avoiding errors resulting from too little or too much use of force.

Similarly, it is by no means apparent that the Secretary of Agriculture, for whom *Butz v. Economou*¹⁵⁷ found the qualified

¹⁵⁴ Police and prison officials are the officers most frequently subject to suit. See, e.g., *Hoitt v. Vitek*, 497 F.2d 598 (1st Cir. 1974); *Boulware v. Parker*, 457 F.2d 450 (3d Cir. 1972). Both of these cases challenged particular uses of disciplinary measures such as solitary confinement; injunctive relief was granted in *Hoitt*. See also *Wright v. McMann*, 460 F.2d 126 (2d Cir.) (awarding damages to prisoner who had been stripped and placed in cell without bed or hygienic facilities to discipline him for "rebellious" conduct), *cert. denied*, 409 U.S. 885 (1972). See notes 188-92 *infra* & accompanying text.

¹⁵⁵ 416 U.S. 232 (1974). See notes 82-86 *supra* & accompanying text.

¹⁵⁶ See *Krause v. Rhodes*, 471 F.2d 430, 432-33 (6th Cir. 1972), *rev'd sub nom.* *Scheuer v. Rhodes*, 416 U.S. 232 (1974). The Supreme Court gave a shorter statement of the facts alleged. 416 U.S. at 235.

¹⁵⁷ 438 U.S. 478 (1978).

immunity defense sufficient, makes decisions under pressures more skewed than those operating on his subordinates who were granted broad immunity by the same decision.¹⁵⁸ The head of a Cabinet department, directly responsible to the President, frequently examined by the Congress, and visible to the press, can be expected to fall closer to category three than to category two to the extent he is involved in setting general policies for handling revocations such as that at issue in *Butz*, and closer to category four insofar as he is involved in disposing of any particular case.¹⁵⁹ It cannot be denied that intent errors, as well as performance errors, might occur at the very highest levels of government. As with category three and four activities generally, however, the need for damage liability to provide incentives to avoid such errors is slight and the cost of detecting such errors through damage suits is substantial. At least so long as it is assumed that compensation is otherwise available, it would appear that high-ranking government officers are more appropriately accorded the same immunity as legislators and judges enjoy.

In defense of the Court's integration of high-ranking officers with other executive officials, it might be argued that the Court effectively has retained the benefit of absolute immunity for such officials without the need for locating the bright line between immune executive officers and those enjoying the hybrid qualified immunity. The performance standard itself, as well as the rigor with which an official is held to it, determines the nature of the liability constraint. Insofar as courts have judged high-ranking

¹⁵⁸ Broad immunity was granted to the administrative law judge and to the attorney presenting the case for revoking the plaintiff Economou's registration as a commodities future merchant. *Id.* 508-17. The revocation action was commenced following audits of plaintiff Economou's company. The officer of the Department of Agriculture initiating the proceeding charged, on the basis of information revealed by the audits, that Economou willfully had failed to observe the Department's regulations concerning financial reserves of registered commodities futures dealers. There is no evidence that Secretary Butz had any connection with the case prior to Economou's appeal to him from the administrative law judge's recommended decision, nor was Butz alleged to have any personal relationship with Economou or his competitors. Indeed, there was no evidence that Butz, who had delegated his review authority to a department judicial officer, had any direct connection with the decision, and certainly no evidence that Economou lacked ample protection against errant official action. He received a formal hearing before a hearing examiner who was insulated from other employees of the Department. He also had the opportunity to present testimony, to cross-examine witnesses, and to utilize a series of other protections. See 5 U.S.C. §§ 554, 556 (1976); 17 C.F.R. §§ 8.01-11.8 (1980). Moreover, Economou had the opportunity for judicial review; indeed, he secured reversal of the Department's action due to noncompliance with certain departmental guidelines. *Economou v. U.S. Dep't of Agriculture*, 494 F.2d 519 (2d Cir. 1974) (per curiam).

¹⁵⁹ See generally W. NISKANEN, BUREAUCRACY AND REPRESENTATIVE GOVERNMENT 22-42 (1971); Shepsle, *supra* note 29, at 44.

executive officials by more lenient performance standards than might be devised for lower-ranking officers, the application of a uniform qualified immunity defense may allow treatment for the former group of officials more nearly approximating the absolute immunity accorded judges and legislators.¹⁶⁰ In this regard, the paucity of damage judgments against high-ranking officials is noteworthy, suggesting that courts in fact treat their conduct in the manner suggested here for category three. Moreover, the willingness of courts in many instances to use fairly charitable performance standards in assessing the liability of even relatively low-level officials suggests a recognition that many executive officers are constrained by incentives intermediate between those described in categories two and three.¹⁶¹ Thus, the performance standards employed by the courts may reduce the impact of the disparity between the analysis presented here and the Court's decisions respecting immunity for executive officials.

IV. OVERDETERRENCE: EFFECTS OF LIABILITY

Although the Court's treatment of official liability fits reasonably well with a model limited to consideration of a single cost of liability (the difficulty of evaluating official decisions), there is another significant cost to official liability: the potential for overdeterrence of official action. The possibility that liability for one sort of official error could induce errors in the opposite direction has received considerable attention from the courts. That was the principal concern expressed by Justice Harlan in *Spalding v. Vilas*¹⁶² and by Judge Hand in *Gregoire v. Biddle*.¹⁶³ It also has been offered as the main justification for absolute immunity of legislators and judges.¹⁶⁴ This part examines the possible overdeterrence effects of liability and responses that might limit those effects.

A. Assessing Overdeterrence

The concern with overdeterrence is far from trivial. Take an activity that arguably falls within category two—arrest of suspects who have prior convictions. The police officer presumably has rela-

¹⁶⁰ See, e.g., *Cofone v. Manson*, 594 F.2d 934 (2d Cir. 1979).

¹⁶¹ See, e.g., *Baker v. McCollan*, 443 U.S. 137 (1979); *Galella v. Onassis*, 487 F.2d 986 (2d Cir. 1973).

¹⁶² 161 U.S. 483, 498 (1896).

¹⁶³ 177 F.2d 579, 581 (2d Cir. 1949), *cert. denied*, 339 U.S. 949 (1950).

¹⁶⁴ E.g., *Stump v. Sparkman*, 435 U.S. 349, 356-64 (1978); *Tenney v. Brandhove*, 341 U.S. 367, 377-78 (1951).

tively strong incentives to arrest and relatively weak incentives to delay until he can develop additional or more accurate information linking the suspect to the crime at issue.¹⁶⁵ Liability for wrongful arrest will provide a counterweight to his imbalance in incentives. This counterweight, which could be termed the "liability incentive" or the "expected damage penalty," ideally should be just enough to discourage arrest whenever the social costs of an arrest exceed the social benefit. Any greater expected damage penalty will discourage arrests in situations where the social benefits of such action exceed its cost.¹⁶⁶

A term such as expected damage penalty usually connotes the current value to an actor of a future damage judgment against him discounted by the judgment's improbability. Viewed thus, three elements are widely recognized as critical to determining the expected damage penalty: the standard for assessing liability; the defenses to liability, and the magnitude of the penalty imposed in the event of liability. It has been urged in other contexts that, despite the difficulty of the task, courts have performed well in combining these elements to produce an expected damage penalty of the appropriate magnitude to offset imbalanced nonliability incentives.¹⁶⁷

Rightly understood, however, there is a fourth element—likelihood of suit—that is also critical to calibration of the liability incentive. Generally, this element is ignored, on the assumption that if the purpose of suit for the plaintiff is to secure money damages, suits as a rule will be brought whenever the probable award exceeds the probable costs of litigating.¹⁶⁸ Under this assumption, the other three elements dictate the likelihood of suit. Following this analysis, there is no need to take account of the additional penalty (beyond the expected damage award) exacted of successful

¹⁶⁵ The group from which suspects are most likely to be drawn—those who have engaged in illegal behavior, especially violent behavior—is composed disproportionately of poor persons and members of racial minority groups. See, e.g., Clark & Wenninger, *Socio-Economic Class and Area as Correlates of Illegal Behavior among Juveniles*, 27 AM. SOC. REV. 826 (1962); Miller, *Lower Class Culture as a Generating Milieu of Gang Delinquency*, 14 J. SOC. ISSUES 5 (No. 3 1958). These people are less likely to wield political influence than are potential crime victims. The resulting incentive structure for police produces a "combat" orientation toward crime suspects. See, e.g., H. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* 332-33 (1968); A. REISS, *THE POLICE AND THE PUBLIC* 141-44 (1971).

¹⁶⁶ Cf. *Scherer v. Brennan*, 379 F.2d 609 (7th Cir.) (holding federal agents charged with protecting the President immune from suit alleging trespass on private property), cert. denied, 389 U.S. 1021 (1967).

¹⁶⁷ E.g., Posner, *supra* note 8.

¹⁶⁸ See Foote, *Tort Remedies for Police Violations of Individual Rights*, 39 MINN. L. REV. 493, 496-99 (1955); Mashaw, *supra* note 29, at 28-29.

defendants in the form of litigation costs.¹⁶⁹ Because losing plaintiffs as well as successful defendants bear their litigation costs,¹⁷⁰ each successful defendant who pays this penalty should be offset by an official who could have been successfully sued but was not, and thus was spared litigation costs.¹⁷¹

Even if the assumptions concerning motivation for suit and irrelevance of litigation costs are generally merited, there is no reason to expect them to retain validity for the full run of litigation against officials. If litigation imposes some costs on defendants whether they win or lose, might not the desire to impose those costs on a defendant, rather than to secure financial rewards, motivate some suits?¹⁷² This possibility exists for all types of lawsuits, but two features of government action may make the initiation of such "spite" suits against officials peculiarly likely. First, many government officials are vulnerable to personal suit because they exercise power over others directly and visibly: the teacher who suspends a student,¹⁷³ the policeman who arrests a suspect,¹⁷⁴ and the judge who passes sentence¹⁷⁵ all are clearly identifiable as indi-

¹⁶⁹ See Mashaw, *supra* note 29, at 28.

¹⁷⁰ The use of contingent fees to allow sale of part of the plaintiff's claim to his lawyer does not change the analysis here. Lawyers, of course, will not incur the litigation costs absent a belief that the probability of success justifies the expenditure.

In litigation under § 1983, and in related actions, there is provision for recovery of attorney's fees by the prevailing party. 42 U.S.C. § 1988 (1976); see *Maher v. Gagne*, 448 U.S. 122 (1980); *Maine v. Thiboutot*, 448 U.S. 1 (1980); *Hutto v. Finney*, 437 U.S. 678 (1978). While successful defendants, thus, could be reimbursed for their costs, the standards for reimbursement of defendant's attorney's fees are quite stringent, much more so than for plaintiffs. Compare *David v. Travisano*, 621 F.2d 464 (1st Cir. 1980) (per curiam) with *United Handicapped Fed'n v. Andre*, 489 F. Supp. 1040, 1048 (D. Minn. 1980).

¹⁷¹ Indeed, under the "American rule" respecting attorney's fees, the defendants generally will not incur any costs unless the plaintiff deems the probability of success greater than one in two—the defendant pays out the damage award plus so much of litigation costs as is not publicly underwritten, while the plaintiff receives only the award minus his attorney's fees. Let P represent the probability of award, A represent the damage award, and B represent attorney's fees. Holding these equal for plaintiffs and defendants, suit will be brought when

$$(P \cdot A) = B > B.$$

In many cases for which the chance of liability is even, suit will not be brought and no expenses will be incurred by defendant. This scenario, as stated above, is based on limiting assumptions respecting the motivation for suit and equality of damage award and litigation costs for plaintiffs and defendants. For discussion of the differences between English and American rules respecting award of attorney's fees, see Posner, *An Economic Approach to Legal Procedure and Judicial Administration*, 2 J. LEGAL STUD. 399, 437-38 (1973).

¹⁷² See *Leff, Injury, Ignorance and Spite—The Dynamics of Coercive Collection*, 80 YALE L.J. 1 (1970).

¹⁷³ See, e.g., *Wood v. Strickland*, 420 U.S. 308 (1975).

¹⁷⁴ See, e.g., *Pierson v. Ray*, 386 U.S. 547 (1967).

¹⁷⁵ See, e.g., *O'Shea v. Littleton*, 414 U.S. 488 (1974).

viduals whose actions operate immediately against a likely complainant. In this respect, these officials differ from a wide array of employees in other large organizations whose activities, for instance in the design or manufacture of a given product, might adversely affect potential plaintiffs. Second, as the examples of official action just given illustrate, governmental action frequently is coercive in nature, intruding on individuals who may have resisted contact with those officials. It is plausible to expect anger directed against such officials to motivate suit, regardless of likely recovery, more often than would occur where the user of a commercial product, having sought contact with the producer, is disappointed with or injured by it.¹⁷⁶

If nonmeritorious suits¹⁷⁷ are brought against government officials with some frequency, the expected damage penalty calculated by the courts on the basis of the liability standard, defenses, and assessed damages may be considerably smaller than the liability incentive that in fact will help shape the particular official's conduct. A liability standard, moderated by a defense of qualified immunity and by rules limiting damage calculations, and designed to reduce police incentives to overarrest, might result in a pattern of underarrest. If the nonliability incentives to overarrest were weak, and if the officer is likely to be subject to suit for any arrest, no matter how clearly within the standard of desirable performance, he may opt not to arrest in many cases for which the arrest is socially valued.¹⁷⁸

In large measure, the magnitude of the overdeterrence problem depends on the clarity of the performance standard and the scope of the official's recognized defense. At one extreme, absolute immunity reduces the cost of overdeterrence to a minimum. The official identifies himself as such, and suit against him is dis-

¹⁷⁶ Cf. Bell, *Proposed Amendments to the Federal Tort Claims Act*, 16 HARV. J. LEGIS. 1, 6 n.22 (1979) (describing some of the cases brought against the author during his tenure as Attorney General).

¹⁷⁷ The term "nonmeritorious" is intended to cover suits that should not result in liability under a perfect application of the relevant judicial rules. That the costs of bringing a suit exceed the likely damage award would not render a suit nonmeritorious.

¹⁷⁸ See comments by Professors Goetz, Olson, and Shepsle, at Symposium on Civil Liability of Government Officials, reported as *Discussion*, 42 LAW & CONTEMP. PROB. 79, 100-14 (Winter 1978). A separate but related problem is presented by the likelihood that officials will be "risk averse." That is, a given expected damage penalty including litigation costs will have more impact on official conduct than is statistically merited because the fear of a great loss will not be fully discounted by its unlikelihood. See, e.g., R. POSNER, *supra* note 141, § 4.5, at 76-77 (2d ed. 1977). The various nonliability incentives could be adjusted, of course, to offset the impact of risk aversion. For a discussion of both concerns in a specific context, see Yudof, *supra* note 29.

missed. The cost to the defendant, and consequently the harassment value to the plaintiff, is negligible. This is precisely the reason the Court bars suits against judges and legislators.¹⁷⁹ The Court's treatment of executive officers, however, appears to leave considerable scope for harassment suits. The official must plead, and in many jurisdictions prove, both his good faith and general fidelity to the performance standard.¹⁸⁰ If the burden of persuasion is on plaintiff, the vagueness of many performance standards may make it relatively difficult to demonstrate intent errors as well as performance errors.¹⁸¹ If the defendant must carry this burden, there is considerable possibility that an official could be found liable for either intent or performance errors.¹⁸² In any event, the imprecision of the standard allows room for costly litigation over the official's intent and over the legality of his acts.

It is easy to understand the Court's reluctance to make it difficult to impose sanctions on officials who intentionally or blatantly abuse their authority, but some of the Court's language exacerbates what under the best of circumstances may be a difficult problem. The prospects of overdeterrence would be raised appreciably if lower courts took seriously the Supreme Court's statement that officials "should have known" their actions were unlawful (and therefore will be liable) if those actions violate a constitutional proscription interpreted previously by the courts or clearly spelled out in the Constitution: "an act violating a [person's] constitutional rights can be no more justified by ignorance or disregard of settled, indisputable law . . . than by the presence of actual malice."¹⁸³ The meaning of constitutional provisions, however, is a source of endless controversy; it is difficult to find any provision the meaning of which, as applied to a host of different factual set-

¹⁷⁹ See *Stump v. Sparkman*, 435 U.S. 349, 356-64 (1978); *Tenney v. Brandhove*, 341 U.S. 367, 377-78 (1951).

¹⁸⁰ *Gomez v. Toledo*, 446 U.S. 635 (1980). See notes 89-90 *supra* & accompanying text.

¹⁸¹ See text accompanying note 123 *supra*.

¹⁸² As Judge Hand recognized in *Gregoire*, there is always the possibility that an official operating in good faith within what he reasonably believes to be his authority will later be found to have acted in bad faith or unreasonably far beyond his powers: "it is impossible to know whether the claim is well founded until the case has been tried, and . . . [if his authority is found wanting,] an official may later find himself hard put to it to satisfy a jury of his good faith." 177 F.2d at 581. The greater the burden on the official-defendant, the more likely an erroneous judgment against him. For a collection of cases placing on the official the burden of proving his good faith and reasonable belief in authorization, see note 90 *supra*.

¹⁸³ *Wood v. Strickland*, 420 U.S. 308, 321 (1975).

tings, is made clear by constitutional text, history, or judicial gloss. Even where a meaning can be made out in judicial pronouncements, it is difficult to believe that officials are conversant with the myriad opinions, not infrequently conflicting, interpreting constitutional restraints.¹⁸⁴ The Court's statement, hence, must either provide for liability only in situations that almost never arise or open officials to potential liability in an incredible array of circumstances in which the likelihood of being held answerable in damages is exceedingly difficult to calculate in advance.¹⁸⁵ The latter possibility, if credited, might be sufficient to restrain a great deal of socially valued conduct.

One argument advanced against giving credence to concerns about overdeterrence as a result of vexatious litigation is that plaintiffs bear the same litigation costs as defendants.¹⁸⁶ Even allowing that some plaintiffs may be willing to pay to satisfy a taste for harassment, the more expensive suits become for defendants (thus increasing overdeterrence problems), the more expensive suits also become for plaintiffs. Other things being equal, the quantity of harassing suits should decline as their price to plaintiffs rises. While the reasoning is sound, the premise is not. First, a successful outcome may not have equal value to both sides, and that will affect the parties' expenditures. The loss of a suit may cost the defendant not just the sum paid over to the plaintiff, but also opportunities for career advancement on which he places considerably more value. Second, the investment of time by parties to these suits may be considerable, and the alternative uses of plaintiffs' and defendants' time may have strikingly different value.¹⁸⁷ Third, some classes of plaintiffs may have access to inexpensive legal services not available to defendants.¹⁸⁸ These disparities often hold

¹⁸⁴ See generally Cass, *Ignorance of the Law: A Maxim Reexamined*, 17 WM. & MARY L. REV. 671 (1976).

¹⁸⁵ *Wood v. Strickland* repeats the pattern set by Justice Douglas's plurality opinion in *Screws v. United States*, 325 U.S. 91 (1945), disposing of a similar issue by narrowly construing the statute at issue (the criminal code analogue to § 1983) to avoid constitutional objections, then using broad assumptions to fit the conduct at bar within the newly narrowed definition of the offense. Compare the reading given to the statute in *Screws*, 325 U.S. at 101-04 with the *Wood* Court's construction, 420 U.S. 308, 318-22 (1975). The result is that it is not clear whether the Justices mean to apply a terribly narrow or terribly broad standard of immunity.

¹⁸⁶ See, e.g., Mashaw, *supra* note 29, at 28-29.

¹⁸⁷ See Bell, *supra* note 176.

¹⁸⁸ Of course, to the extent suits against officers are defended at government expense, defense costs no longer are a deterrent to the officer; nor is imposition of those costs on the officer an inducement to suit. See text accompanying notes 231-37 *infra*.

where the plaintiff is a prisoner or an arrestee, two groups with especially great incentives to vexatious litigation.¹⁸⁹

In combination, these distinctions between the litigation cost incurred by plaintiffs and those imposed on defendants justify considerable concern about overdeterrence even for conduct most analogous to category two. Although it is difficult to make much of these figures, the filings against police officers and prison officials are consistent with the notion that the qualified immunity defense does not discourage harassing litigation. Legal actions filed by prisoners alleging violations of constitutional guarantees, for example, have increased from less than 2,200 filings in federal district courts in 1970 to 6,606 in 1975 and 13,000 in 1980, a 491% increase in little more than a decade.¹⁹⁰ The percentage of these suits that are dismissed is quite high; nonetheless, the number that proceed to trial is significant, while the instances of liability judgments against defendants are negligible.¹⁹¹ It is possible that many meritorious claims are being dismissed for inartful pleading and that other meritorious claims are being denied after trial for failure to clear a too-high burden of persuasion. It is at least equally plausible, however, that because of frustration, lack of other means for relief of related grievances, pique, or simply antipathy for the defendant, many nonmeritorious claims are being brought, consuming considerable judicial resources, entailing sizeable defense costs, yielding few damage awards, but perhaps discouraging some desirable official conduct.¹⁹²

¹⁸⁹ See text accompanying notes 172-76 *supra*.

¹⁹⁰ ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, 1979 ANNUAL REPORT OF THE DIRECTOR Table 21, at 61; ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, 1980 ANNUAL REPORT OF THE DIRECTOR Table 21, at 62. In comparison, all civil filings increased 93% during this same period, a rate of growth less than one-fifth that for prisoner's civil rights filings. ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, 1979 ANNUAL REPORT OF THE DIRECTOR Table 18, at 58; ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, 1980 ANNUAL REPORT OF THE DIRECTOR Table 19, at 61. See also Turner, *When Prisoners Sue: A Study of Prisoner Section 1983 Suits in the Federal Courts*, 92 HARV. L. REV. 610 (1979). The number of prisoner suits under §1983 was only 218 in 1966, the first year for which such statistics were kept. *Id.* 611; ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, 1975 ANNUAL REPORT OF THE DIRECTOR 207.

¹⁹¹ While the *percentage* of prison-filed cases that goes to trial is quite low, see Turner, *supra* note 190, Appendix B, at 660-63, the *number* is not insignificant. A study conducted for the Harvard Law School Center for Criminal Justice examined a sample of cases from five federal court districts during a 2½-year period and found that there were eleven trials of prisoner suits based on §1983 and that, for trials and hearings, prisoner-filed §1983 cases in these districts accounted for 44 court days. *Id.* 616 & n.38, 624 & n.82, Appendix B.

¹⁹² See generally Mathes & Jones, *Toward a "Scope of Official Duty" Immunity for Police Officers in Damage Actions*, 53 GEO. L.J. 889 (1965).

B. Preventing Overdeterrence: Individual and Institutional Responses Short of Immunity

Given the opportunity for harassment implicit in the liability-immunity standards adopted by the Court for executive officers, it is possible that present rules respecting official liability may deter desirable, along with undesirable, official conduct sufficiently to yield net social costs. This potential for overdeterrence, however, need not automatically be realized. There are numerous antidotes to overdeterrence that may be taken by individual officials or by the enterprises for which they work. Insurance is the most obvious of these.¹⁹³ If officials are concerned over the threat of liability, they may be willing to pay a sum certain (and some entrepreneur, an insurer, presumably would be willing to collect that sum from all risk averse officials) to avoid the risk of liability. By spreading the risk of a large financial loss over a class of similarly insured officials, insurance would reduce each official's incentives to avoid activities that might generate liability suits.¹⁹⁴ To the extent that litigation costs, rather than simply liability, are a concern, insurance could pool the risk of incurring costs in defending damage suits as well as in satisfying damage judgments.

Insurance, while useful, is not a perfect antidote to rules that produce a too-high liability incentive. First, to the extent insurance is effective, it may so fully reduce the incentive to avoid liability-producing (as well as lawsuit-producing) activity that one simply replaces the imbalance of an overdeterrent liability incentive with the original underdeterrent incentive structure that prompted formulation of the liability standard. This return from overdeterrence to underdeterrence (the functional equivalent of immunity) would be accomplished at the cost of both making liability determinations and operating the insurance system. And although insurance theoretically can be structured to achieve a middle ground, retaining some of the liability incentive's effects while eliminating the risk of large losses (as "deductibles" and other limiting provisions are designed to do), there are significant practical barriers to the translation of liability incentives into insurance policies.¹⁹⁵ Insofar as insurers use more easily administrable

¹⁹³ See Mashaw, *supra* note 29, at 27.

¹⁹⁴ See K. ARROW, *Control in Large Organizations*, in *ESSAYS IN THE THEORY OF RISK-BEARING* 223 (1971); Shavell, *Risk Sharing and Incentives in the Principal and Agent Relationship*, 10 BELL J. ECON. 55 (1979).

¹⁹⁵ See H. ROSS, *SETTLED OUT OF COURT* (1970); Blum & Kalven, *Ceilings, Costs, and Compulsion In Auto Compensation Legislation*, 1973 UTAH L. REV. 341.

classifications as surrogates for identifying activity that should be penalized, and structure insurance policies to visit some portion of that penalty on the individual insured, the function actually performed by insurance may diverge greatly from the goals liability was intended to achieve.¹⁹⁶ The magnitude of this divergence of the legal rule and the practical result will depend on the ease with which liability can be determined—the more difficult the determination, the greater the likely difference.

Second, while some officials will purchase insurance, other officials might prefer to alter their behavior so as to minimize the risk of suit rather than incur the cost of insurance. To the extent the Court's rules generate a too-great liability incentive, some of this avoidance behavior will be socially undesirable although personally beneficial. The official who is overdeterred by the liability incentive—an extreme example would be a police officer who refused to make any arrest on less than near-certain proof of the arrestee's guilt—may still be overdeterred when insurance is available. Paying the insurance premiums and acting in a socially desirable manner, even though such behavior generates some risk that the official will be sued, may be more costly to the official than engaging in liability avoidance behavior that has negative social value but that minimizes the risk of suit.¹⁹⁷ The simple availability of insurance to individual officials, thus, does not eliminate the need for some other mechanism to counter overdeterrence. To avoid the problems of divergence between personal benefit and social value in the face of a too-great liability incentive, some institutional control is required.

The employing enterprises, of course, are not without means to remedy departures from optimal behavior generated by fear of liability. The enterprise can insure its employees against the costs of liability and/or providing a defense, eliminating the inducement for employees to alter their behavior in order to avoid the cost of insuring. It can, without the intermediary, produce the same result by satisfying the damage judgments against employees and by subsidizing or providing any necessary defense. Finally, it can

¹⁹⁶ See H. Ross, *supra* note 195, at 233-43; Bombaugh, *The Department of Transportation's Auto Insurance Study and Auto Accident Compensation Reform*, 71 COLUM. L. REV. 207, 214, Table 3 (1971).

¹⁹⁷ To the extent officials are free to choose between personally and socially desirable responses, official positions may become relatively more valuable to individuals who choose the former response than to those who choose the latter. Judge Hand, in *Gregoire*, raised a similar point in noting the potential of damage liability to make official positions more attractive to the irresponsible than to the ordinary official. 177 F.2d at 581.

undertake to monitor employee behavior more closely so that liability incentives do not induce undesirable behavior.

Each of these mechanisms presents some problem. Paying for the defense of the defendant-employee's choosing, for instance, could be extremely costly; sued employees would have incentives to over-invest in their defense.¹⁹⁸ Conversely, actually providing the defense for employees might not fully counteract overdeterrence if employees would invest greater resources in their own defense than are provided or if they remain fearful of losing. A general problem is that each of the mechanisms that combats overdeterrence also reduces beneficial deterrence.¹⁹⁹ To prevent this, additional resources must be expended to structure somewhat more complex mechanisms: for example, insuring employees except against certain types of liability or except when employees are determined to have been at fault to some specified degree, or insuring for less than the full amount of liability.²⁰⁰

In a private, profit-making enterprise, there is a metric—profits—that makes this kind of fine tuning of incentives a plausible solution. An enterprise that pursues the goal of profit maximization will endeavor to prevent liability rules from affecting employees' conduct in ways that reduce profits.²⁰¹ If an employee is made personally liable—for example, a designer of airplanes held liable for injuries and deaths that are caused by insufficiently safe design—and the employee then is overdeterred from the errors liability was intended to prevent, the enterprise's profits will be adversely affected. Overdeterrence here can be identified without great difficulty. Planes that are slower, more costly, less fuel efficient, or require additional maintenance—all potential responses to increasing safety—will be less desirable to buyers, other things being equal. If damage awards measure the injury costs of an activity and the price paid by buyers measures its benefits, socially optimum ex-

¹⁹⁸ Cf. Jensen & Meckling, *supra* note 27, at 317 (comparing incentives of owners and managers).

¹⁹⁹ See Baxter, *supra* note 29, at 51.

²⁰⁰ See Jensen & Meckling, *supra* note 27; Stiglitz, *Incentives, Risk, and Information: Notes Towards a Theory of Hierarchy*, 6 BELL J. ECON. 552 (1975). Analogous to these efforts are attempts to use different figures for liability and recovery so that one party is given the right incentive to good behavior and the other party is given the appropriate incentive to police that behavior. See Becker & Stigler, *Law Enforcement, Malfeasance, and Compensation of Enforcers*, 3 J. LEGAL STUD. 1 (1974); Landes & Posner, *The Private Enforcement of Law*, 4 J. LEGAL STUD. 1 (1975); Polinsky, *Private versus Public Enforcement of Fines*, 9 J. LEGAL STUD. 105 (1980).

²⁰¹ See Fama, *supra* note 27; Jensen & Meckling, *supra* note 27; Shavell, *supra* note 194.

penditures on safety will be to the point where an additional dollar spent in that endeavor (in reduced value of the plane or in increased costliness of its design and construction) will produce exactly one dollar reduction in the expected damage penalty.²⁰² Such behavior would be synonymous with profit maximization where the enterprise is liable. Making the employee liable does not change the calculus. The airplane manufacturer should respond by insuring the employee, assuming liability, monitoring his behavior, and so on, to the point where the cost of such additional expenditures exactly equals the gain of producing more highly valued planes.²⁰³ This is, in fact, the way such enterprises have reacted to instances of potential employee liability.²⁰⁴

The response of profit-making private enterprises to potentially overdetering liability rules for employees reaches the socially desirable outcome despite the fact that corporations, like governmental entities, are composed of a variety of individuals with disparate personal interests.²⁰⁵ The differences among the interests of corporate employees, directors, and stockholders have been thought sufficient to require some legal protection for the last of these groups, although their community of interest has been deemed sufficient to severely limit the scope of legal remedies.²⁰⁶ Recent discussion of these enterprises has identified a variety of devices that operate to reduce the disparity of individual interests within the corporation and to induce the individuals comprising the corporation to act in a fashion that promotes their joint interest.²⁰⁷ The widespread practice of giving key managerial personnel ownership

²⁰² See P. SAMUELSON, *supra* note 118, at 495-98.

²⁰³ See Baxter, *supra* note 29, at 49-52; Fama, *supra* note 27; Jensen & Meckling, *supra* note 27.

²⁰⁴ See Baxter, *supra* note 29, at 49; Landes & Posner, *Joint and Multiple Tortfeasors: An Economic Analysis*, 9 J. LEGAL STUD. 517 (1980). See also Conard, *A Behavioral Analysis of Directors' Liability for Negligence*, 1972 DUKE L.J. 895.

²⁰⁵ See, e.g., Alchian & Demsetz, *Production, Information Costs, and Economic Organization*, 62 AM. ECON. REV. 777 (1972); Holmstrom, *Moral Hazard and Observability*, 10 BELL J. ECON. 74 (1979); Jensen & Meckling, *supra* note 27.

²⁰⁶ See, e.g., Hetherington & Dooley, *Illiquidity and Exploitation: A Proposed Statutory Solution to the Remaining Close Corporation Problem*, 63 VA. L. REV. 1, 39 n.124 (1977) (discussing the "business judgment" rule).

²⁰⁷ See Fama, *Efficient Capital Markets: A Review of Theory and Empirical Work*, 25 J. FINANCE 383 (1970); Jensen, *Capital Markets: Theory and Evidence*, 3 BELL J. ECON. & MANAGEMENT SCI. 357 (1972); Manne, *Mergers and the Market for Corporate Control*, 73 J. POL. ECON. 110 (1965). But see Grossman & Hart, *Takeover Bids, the Free-Rider Problem, and the Theory of the Corporation*, 11 BELL J. ECON. 42 (1980). A recent argument that laws have reduced the benefit of takeovers is in Jarrell & Bradley, *The Economic Effects of Federal and State Regulations of Cash Tender Offers*, 23 J.L. & ECON. 371 (1980). See also Easterbrook & Fischel, *The Proper Role of a Target's Management in Responding to a Tender Offer*, 94 HARV. L. REV. 1161 (1981).

interests in the corporation, for example, is one mechanism by which managers' and stockholders' interests are made more congruent.²⁰⁸ Given these harmonizing devices, liability rules for corporations or corporate employees are likely to reach socially valued results if the entity or any of its component members is in a position to respond to the liability rule efficiently. The courts need not ascertain which among the various possible defendants can efficiently respond to the liability rule; so long as one of them can, they are likely to reach the appropriate outcome through a process of implicit or explicit bargaining once liability is imposed on any of the defendants.

C. Institutional Responses to Overdeterrence: The Special Case of Governmental Enterprises

Governmental enterprises, however, are less likely than private, profit-making entities to respond appropriately when one of their employees is subject to an overdeterrent liability constraint. Three different but related reasons impair the governmental response.

First, governmental enterprises lack the kind of clear goal that profit-making firms enjoy.²⁰⁹ Liability may be a desirable means of forcing private firms to consider costs they might otherwise ignore, but with or without liability the joint goal of the firm members is to maximize profits. The efficient response to liability for the firm (irrespective of the efficiency of the liability rules) is the response consistent with profit maximization.²¹⁰ There is, however, no similar, easily stated goal for government. The "members" of any governmental enterprise (the citizenry of the relevant jurisdiction and the officials employed by it) may want very different goals pursued. Attempts to define an ideal for government inevitably meet a host of objections.²¹¹

²⁰⁸ See, e.g., Fama, *supra* note 27; Jensen & Meckling, *supra* note 27; Shavell, *supra* note 194.

²⁰⁹ Almost any discussion of what government should do demonstrates this point. See, e.g., J. RAWLS, *A THEORY OF JUSTICE* (1971). Efforts to assess government performance by reference to a single principle, see Coase, *The Market for Goods and the Market for Ideas*, 64 *AM. ECON. REV.* 384 (1974); Director, *The Parity of the Economic Market Place*, 7 *J.L. & ECON.* 1 (1964), have not been endorsed widely by academics nor embraced by public officials. Whatever the appeal of these efforts, they cannot be taken as statements of the accepted measure of good government.

²¹⁰ See Baxter, *supra* note 29, at 48-49.

²¹¹ See discussion of J. RAWLS, *supra* note 209, in Feldman, Book Review, 61 *CALIF. L. REV.* 1463 (1973); MacIntyre, Book Review, 52 *B.U.L. REV.* 330 (1972); McBride, Book Review, 81 *YALE L.J.* 980 (1972); Narveson, *A Puzzle About Economic Justice in Rawls' Theory*, 4 *SOC. THEORY & PRAC.* 1 (1976).

Second, even if we could identify a goal for government, there would be considerable difficulty determining whether the goal was accomplished.²¹² The existence of markets for the purchase and sale of private firms' products and of the ownership interests in those firms provides a useful yardstick for the firm's success. If I own stock of an airplane manufacturer, the change in stock prices and return in dividends give me relatively easy measures of management's performance; the prices buyers will pay for their planes and for their competitors' planes together with the costs of design and production give management a useful indication of the strengths and weaknesses of the firm's product. Governmental enterprises, in contrast, seldom produce products that are evaluated by a marketplace where they compete with other, similar products.

Third, the control mechanisms available to members of a governmental enterprise to regulate the conduct of other members are less useful than the control mechanisms available in a private firm. In part this reflects the greater difficulty of identifying a goal and evaluating performance in the government context. It also results from differences in how one becomes a member of the enterprise. If I own stock in a corporation, I may lack direct control over the corporation's management in any meaningful sense, but I can sell my stock if the investment is not satisfactory. If my perception of management's inadequacy is shared by others, stock prices will decline and other managers will be alerted to the likelihood that additional profits (for both stockholders and managers) could be had from improved management. Ultimately, stock sales provide the vehicle for a credible threat that poorly performing managers will be replaced.²¹³ The private firm's managers, in turn, have a set of useful control devices at their disposal to ensure adequate performance by other employees. Managers generally have considerable freedom to replace personnel or alter work methods if the firm's products do poorly in the market or if market success comes at too steep a price.

Neither "owners" nor "managers" have control mechanisms of quite the same force in governmental firms. Citizens dissatisfied with government performance can move away from the jurisdiction or they can vote to remove elected officials from office. Moving, especially if one is reacting to federal policies, is a poor parallel to selling one's stock. Voting, too, is a very imperfect means for

²¹² See, e.g., A. DOWNS, *AN ECONOMIC THEORY OF DEMOCRACY* 207-37 (1957).

²¹³ See Easterbrook & Fischel, *supra* note 207; Hetherington & Dooley, *supra* note 206, at 39-40; Manne, *supra* note 207.

registering a citizen's preferences. Because the citizen may have no single, overarching interest in an official's conduct (something akin to profit maximization), but instead has a number of discrete interests related to different issues, voting for or against an official who has addressed many issues over the past two, four, or six years of his term requires the citizen to balance the decisions he feels were detrimental against those he feels were beneficial.²¹⁴ The official, however, does not learn from the vote which decisions were approved and which were disapproved by the voter. On matters of intense interest, then, a citizen may wish to express his views to elected officials more directly. Lobbying and the various expressions of interest associated with it—for example, promises of campaign contributions or voter support in exchange for a favorable position on the particular issue—may therefore play a more important role than voting in shaping official incentives respecting particular issues.²¹⁵ But the cost of aggregating small interests to underwrite lobbying efforts may prevent the expression of some views in this manner and give officials a distorted picture of voters' preferences. When this happens, there can be "takeover" bids by another candidate or party that believes it has identified a defect in the incumbent's positions sufficiently grave that the coalition of interests he has responded to will be inadequate to secure his reelection.²¹⁶ This only completes the circle since the takeover must be at election time and, if successful, the new "managers" must be informed by the same sort of very imperfect information that initially informed the incumbent.

The elected officials who serve as managers for the enterprise also have more cumbersome tools than their private-sector counterparts for controlling other employees. At first blush, the difference may seem slight. Most public employees are subject to a wide range of inducements to good behavior and sanctions for bad behavior, including job termination or transfer, promotion or demotion, and changes in pay and perquisites.²¹⁷ The government's

²¹⁴ The citizen also must evaluate, on the basis of a similar balancing, the gain that might be obtained from election of the incumbent's opponent. See J. BUCHANAN & G. TULLOCK, *supra* note 131, at 211-31; A. DOWNS, *supra* note 212, at 36-50, 207-37.

²¹⁵ See, e.g., A. DOWNS, *supra* note 212, at 90-95; W. RIKER & P. ORDESHOOK, *supra* note 131, at 71-74, 333-36.

²¹⁶ See A. DOWNS, *supra* note 212, at 23-33, 96-139; Lau & Frey, *Ideology, Public Approval, and Government Behavior*, 10 PUB. CHOICE 21 (1971); Stigler, *supra* note 130, at 94-97.

²¹⁷ See, e.g., A. DOWNS, *INSIDE BUREAUCRACY* 81-87 (1967); Auster, *Some Economic Determinants of the Characteristics of Public Workers* in *ECONOMICS OF PUBLIC CHOICE* 185 (R. Leiter & A. Sirkin eds. 1975). One constraint that

managers, however, have not been given a free hand to use these measures to reward good, and punish bad, behavior. Rather, a complex set of restrictions, most notably the civil service laws, limits the usefulness of these measures as vehicles for shaping official action either to the public's benefit or to its detriment.²¹⁸

These restrictions on hiring, firing, promotion, demotion, and other personnel actions were not adopted because these means of controlling employee behavior are needed less in the public than in the private sector to give employees appropriate incentives to desirable behavior. The restrictions were adopted because the managers controlling such decisions were not trusted to use them to advance socially valued, as opposed to personally desired, behavior. That mistrust follows from the difficulties of defining and recognizing socially desirable governmental action and, hence, of structuring managers' incentives to attain it. It would seem quite odd if the charter of a profit-making enterprise limited the chief executive officer's control over personnel decisions, divided authority among three officers for decisions respecting the purchase of materials and the manufacture and distribution of products, and insulated each of the officers from interference by the others in his area of decisionmaking authority. Corporations are not structured in this manner because investors know what goal they want pursued, agree on the goal, can observe whether it is attained, and can extricate themselves from involvement at reasonably low cost if it

bears special mention is the possibility of criminal sanctions. Considerable attention has focused in recent years on the application of criminal penalties to acts of government officials. The "Watergate" cases, *see, e.g.*, *United States v. Ehrlichman*, 376 F. Supp. 29 (D.D.C. 1974), *aff'd*, 546 F.2d 910 (D.C. Cir. 1976), *cert. denied*, 429 U.S. 1120 (1977), are perhaps the best known instances of the imposition of criminal penalties to official acts. These are, however, unusual. The very severity of criminal sanctions that makes them useful to combat egregious official conduct also raises the spectre of overdeterrence. In place of a credible threat of prosecution for intent or performance errors, prosecutors have followed a strategy that provides scant possibility of overdeterrence by providing no significant possibility of prosecution. Aside from occasional cases involving bribery, extortion, and the like, prosecutors have seldom taken action against public officials. It is difficult to know to what extent failure to prosecute reflects the fact that the prosecutor and likely defendant often share a boss, such as in the case of the federal government, which places both the U.S. attorneys and the F.B.I. under the Attorney General. Whatever the cause, the result of an insignificant prosecution rate is a potential not so much for vexatious litigation as for inconsistent application of criminal laws. The likely case for imposition of criminal penalties is either a dramatic shift in the view of certain activities over time (as arguably occurred in recent prosecutions of former F.B.I. officials) or a great difference in the constituencies of a prosecutor and defendant-official (as in federal prosecutions of local officials). In all events, the criminal sanction will not be viewed as a realistic constraint on most official conduct at the time it occurs.

²¹⁸ See generally R. VAUGHN, *THE SPOILED SYSTEM* (1975); Merrill, *Procedures for Adverse Actions Against Federal Employees*, 59 VA. L. REV. 196 (1973).

is not. Although there is, doubtless, some room for self-interested conduct by the private firm's managers, they can be trusted to make most decisions free from direct constraint—the necessity to produce profits serves as an effective check on most managerial conduct.²¹⁹ In contrast, our whole structure of government is oriented to limiting and dividing official authority.²²⁰ The constitutionally mandated separation of powers among different governmental branches, as well as the host of subsidiary restraints on various officials, reflects the disbelief in our ability to give any official appropriate incentives to act in a manner that promotes the joint interests of all the enterprises' "members."

While the universal imperfection of official incentives provides the obvious impetus for liability, it also provides reason for caution in liability decisions. Because official incentives are imperfect, there always will be official errors that damage penalties might seem useful to remedy. At the same time, there is a likelihood that the socially ideal level of liability will not be found and that departures from the ideal will not be fully corrected by other mechanisms. Because judges, too, have imperfect incentives, they may err in striving to correct other officials' mistakes. Where judges believe that other officials have underestimated the cost of their actions in terms of harm to constitutionally derived values (such as freedom of speech or guarantees against unreasonable searches or seizures), officials from other branches may believe, equally rightly, that the judges have undervalued the benefit of the official conduct under review (in terms, perhaps, of public safety and health or of relief from financial burdens).²²¹ Indeed, section A of this part demonstrated that the Court's qualified immunity decisions might have underestimated the impact of liability on officials.²²²

Moreover, the difficulty of defining a goal for government, of recognizing success or failure in its accomplishment, and of structur-

²¹⁹ See Dooley, *supra* note 28.

²²⁰ See THE FEDERALIST Nos. 47, 51 (J. Madison).

²²¹ Criticism of the courts, particularly the Supreme Court, on such grounds is not hard to find. See, e.g., A. BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS (1970); P. KURLAND, POLITICS, THE CONSTITUTION, AND THE WARREN COURT (1970). The very imprecision of the Constitution, however, ensures such differences. Lord Macaulay's observation on the American Constitution more than a century ago is apt: "It has one drawback—it is all sail and no anchor." Letter from Lord Macaulay to H.S. Randall (May 23, 1857), *quoted in* Cinderella Career & Finishing Schools, Inc. v. FTC, 425 F.2d 583, 591 (D.C. Cir. 1970), and again in Robinson, *The Federal Communications Commission: An Essay on Regulatory Watchdogs*, 64 VA. L. REV. 169, 177 (1978), whence it came to my attention.

²²² See notes 165-92 *supra* & accompanying text.

ing incentives to that end inhibits the correction of socially incorrect liability rules. Professor Coase demonstrated that in a world of zero transaction costs an incorrect liability rule would not affect attainment of the socially efficient allocation of resources.²²³ The doctor and baker in Coase's hypothetical agree to reach the highest-valued use of their adjacent properties whether the baker is or is not liable for the interference with the doctor's business by his noisy machines.²²⁴ The doctor represents fully society's interest in his use of the one property, the baker represents fully society's interest in his use of the other property, and there is no impediment to them striking a bargain that, in turn, fully represents society's interest in the use of both properties. The problems posed by liability rules for government officials differ strikingly from this hypothetical. At the outset, government officials do not fully represent society's interests in their particular activity. Consider the municipal police officer whose sole duty is to identify and arrest felony suspects. Does the police officer represent society's interest in arresting suspects and thus deterring crime? Does he represent society's interest in not stigmatizing or interfering with the liberty of persons who in fact have not committed crimes? Or does the chief of police represent society's interest in the first, and the city council society's interest in the second?

It seems plain that officials may represent more of one interest than another (the category two analogue) or they may represent a relatively balanced set of interests (the category three analogue), but they are not likely to represent fully any of society's interests. If all of the individuals in a community could reveal the value they place on having a suspect arrested when evidence indicates a probability between 51% and 67% that he committed a crime, and they offered a dollar equivalent of that value to official *A* to produce that result; and if all potential suspects likewise fixed a sum that represents the value to them of freedom from arrest on evidence indicating less than a 67% probability of criminality, and they offered a dollar equivalent of that value to official *B* to produce that result; and if all of this could be done costlessly, negotiations between *A* and *B* should result in agreement to produce the socially desirable amount of arresting. Unfortunately, the costs of identifying and acting on society's interest in either side of this equation are prohibitive. Very imperfect information about these values may be conveyed in city council elections. City council

²²³ See Coase, *supra* note 117, at 1-15.

²²⁴ *Id.* 2-10.

members may attempt to instruct the chief of police, and to structure his various employment incentives, to reflect this information. The police chief then may do the same in trying to structure his lieutenants' employment incentives, and so on down to the police officer who must decide when to arrest.

At each point, however, the difficulty of determining the appropriate level of arrests leaves room for deviation from that ideal. How will the police lieutenant or sergeant, much less the city council members, know if police officers are failing to arrest suspects who ought to be arrested? Unlike the case of an arrest that is made when it ought not to be, there is no ready complainant;²²⁵ and unlike comparison of firms' profit figures, there is no easy mechanic for comparing arrest figures.²²⁶ It is, of course, possible that police want to make arrests for reasons apart from institutional incentives.²²⁷ Faced with liability, the police officers may demand protection equivalent to immunity so that they will not have to alter their arresting behavior. If higher-ranking officials believe that liability rules will result in too little arresting, they may press this demand on the city council. And if the council members believe this, they may agree to pay for the police officers' defense, to hold them harmless from liability for arrest, and so on.

The point here is not that actions of this nature do not occur in governmental enterprises. Rather, the point is that they are less likely than in the hypothetical posed by Professor Coase or in the case of private, profit-making firms to result in the socially desirable amount of correction. It is possible that a liability rule's overdeterrence (here, underarrest) will go undetected. If the personally beneficial response to liability for police is, in whole or in part, a too great reduction in arresting, the impediments to communicating this perception to the relevant officials may prevent them from becoming aware of the problem, even if it is perceived

²²⁵ Two recent efforts to devise legal remedies for situations such as this do not address the sizable causation problem that may prevent someone who is in fact harmed from discovering or proving the link to official action. See Note, *Police Liability for Negligent Failure to Prevent Crime*, 94 HARV. L. REV. 821 (1981); Note, *Holding Governments Strictly Liable for the Release of Dangerous Parolees*, 55 N.Y.U. L. REV. 907 (1980). Beneath that problem lies the more general difficulty of assessing the increase in risk to others (and of deciding what step to take with respect to risk-creation) where no causal link to harm can be proved. See Rizzo & Arnold, *Causal Apportionment in the Law of Torts: An Economic Theory*, 80 COLUM. L. REV. 1399 (1980).

²²⁶ Cf. N. MORRIS & G. HAWKINS, *THE HONEST POLITICIAN'S GUIDE TO CRIME CONTROL* 31-34 (1970) (criticizing the currently available crime statistics).

²²⁷ Cf. *Gerstein v. Pugh*, 420 U.S. 103 (1975) (requiring timely judicial determination of probable cause following arrest); L. KATZ, *JUSTICE IS THE CRIME* 51-62 (1972) (examining effects of pretrial delay).

by members of the public in general.²²⁸ If aware of the problem, those officials may be insufficiently rewarded for its correction to take significant steps to that end. The members of the city council, for instance, may derive as much personal benefit from merely issuing a public directive to increase arrests as they would from actually increasing arrests to the optimal level.²²⁹ If the police chief does not really believe the council members are concerned with the level of arrests, or are only mildly and temporarily concerned, he may seek funds from the council for projects of importance to him though only pretextually related to the overdeterrence problem—funds could be used, for instance, to finance a relatively elaborate undercover operation that would be exciting to supervise.²³⁰

It is difficult to predict in any instance whether the government officials ultimately responsible will undercorrect or overcorrect in response to liability rules for government officers; any empirical efforts to ascertain which response is adopted face the same problems of definition and evaluation of the socially desirable result that citizens and officials encounter. Given positive costs to securing action from the ultimate official arbiters and the difficulty of detecting some “shirking” activity (like non-arrest), however, undercorrection frequently will be the more plausible response. As just acknowledged, that supposition is not provable, and examination of the actions governments have in fact taken in response to increasing numbers of suits against officials sheds little light on this. One striking feature of these responses is that no jurisdiction has acted to grant blanket immunity to officials and few have granted immunity for an easily identified class of actions or officers.²³¹

²²⁸ See text accompanying notes 214-16 *supra*. See also Lindsay, *A Theory of Government Enterprise*, 84 J. POL. ECON. 1061 (1976) (describing differences between the public and private sectors based in part on the difficulty of communicating certain information to officials).

²²⁹ See, e.g., *28 Precinct Chiefs Are Told To Battle Rise in Robberies*, N.Y. Times, Aug. 21, 1980, § B, at 3, col. 5. The mayor's directive was given considerable publicity. I am not aware, however, of any subsequent action by the mayor or alteration of the robbery rates.

²³⁰ A series of relatively recent, highly-publicized operations of this sort—the D.C. Police “Sting” and “Got Ya Again” operations and the F.B.I.’s “ABSCAM” operation—lend some credence to this possibility. See, e.g., Gillers, *In Defense of ABSCAM: Entrapment, Where is Thy Sting?* 230 NATION 203 (1980); Wall St. J., Mar. 9, 1976, at 20, col. 1; Wash. Post, Jul. 14, 1976, § 1, at 1, col. 1.

²³¹ Two bills that would have had this effect died in committee during the past two Congresses. S. 695, 96th Cong., 1st Sess. 125 CONG. REC. S2920 (daily ed. Mar. 15, 1979); S. 2117, 95th Cong., 2d Sess. (1978). A more limited provision for federal law enforcement officers was enacted as the intentional tort amendment to the Federal Tort Claims Act. Act of Mar. 16, 1974, Pub. L. No. 93-253, 88 Stat. 50 (codified at 28 U.S.C. § 2680(h) (1976)).

While most jurisdictions have provided some mechanism for defraying the explicit costs of defending damage actions and reimbursing officials for adverse judgments,²³² most states make both payment of (or reimbursement for) defense costs and reimbursement for adverse judgments turn on a determination by a designated government officer or entity that the official-defendant acted in good faith and within the scope of his employment (or some variant of this formula).²³³ That test duplicates the *Scheuer v. Rhodes* qualified immunity standard.²³⁴ Were the standard interpreted uniformly by courts and the officers or agencies deciding when to pay defense costs or judgments, the result would be to allow for reimbursement only where there would be no adverse judgment.²³⁵ Payment of defense costs for nonliable officials still will be of value to potential defendants. But not all states go even this far. Some states refuse to reimburse sued employees who have insured against liability actions,²³⁶ and some states still require private bills from

²³² See, e.g., FLA. STAT. ANN. §§ 111.065-.07 (West Supp. 1980); ILL. ANN. STAT. ch. 127, §§ 1301-1302 (Smith-Hurd Supp. 1979); KAN. STAT. ANN. §§ 75.6101-.6116 (Supp. 1980); MINN. STAT. § 3.736, subd. 9 (West Supp. 1980); OHIO REV. CODE ANN. §§ 9.87, 109.36-.366 (Page Supp. 1980); 42 PA. CONS. STAT. ANN. § 5110(c) (Purdon Supp. 1980); PA. STAT. ANN. tit. 53, § 5311.303 (Purdon Supp. 1980); WIS. STAT. §§ 165.25(6), 895.46 (1974 & Supp. 1980). See also Bell, *supra* note 176, at 7-9; Bermann, *supra* note 29, at 1190-94. The federal government to date lacks explicit statutory basis for insuring or defending officials, although the latter practice has been justified under the general language of the Judiciary Act of 1789, 1 Stat. 92, ch. 20, § 35 (1789) (current version at 28 U.S.C. § 516 (1976)), authorizing litigation of "civil actions in which the United States shall be concerned." See Bell, *supra* note 176, at 3 n.6, 7-8 & n.25. The federal government does indemnify officials for judgments paid out in connection with a limited number of activities, or where the government and official have been found jointly liable, but generally indemnification is not available. See Bermann, *supra* note 29, at 1191-92.

²³³ See, e.g., ILL. STAT. ANN. ch. 127, § 1302(b)-(c) (Smith-Hurd Supp. 1979) (attorney general must determine that the employee acted within the scope of his employment and that intentional, willful, or wanton misconduct was not involved); KAN. STAT. ANN. § 75-6108 (Supp. 1980) (exceptions where act was not within scope of employment or was motivated by malice); N.C. GEN. STAT. § 143-300.4 (1977) (government or private attorney provided if the attorney general determines, *inter alia*, that the challenged act was within the scope of the defendant's employment duties and did not constitute an intentional wrong); OHIO REV. CODE ANN. §§ 9.87(B), 109.362(B)(2), (E)(1) (Page Supp. 1980) (attorney general (defense) or employer (indemnification) must ascertain if the act was within the scope of defendant's employment and taken in good faith, without malicious purpose); WASH. REV. CODE ANN. §§ 4.92.060-.070 (Supp. 1980) (attorney general must find employee's acts to be in good faith and within the scope of his official duties).

²³⁴ See notes 82-95 *supra* & accompanying text.

²³⁵ One can expect, however, that state officials and agencies might apply the standard in a manner more favorable to officials than the courts will.

²³⁶ See MD. ANN. CODE art. 32A, § 12B (Supp. 1980); OHIO REV. CODE ANN. §§ 9.87(B)(1), 109.362(B)(1) (Page Supp. 1980); S.C. CODE § 1-7-60 (1976).

the legislature to recompense officials.²³⁷ It is plausible that this very tempered reaction represents an inadequate response to what probably has been too great an increase in the liability incentive faced by executive officials. Whatever conclusions one draws about undercorrection or overcorrection, however, it is relatively predictable that mechanisms for limiting the impact of expected damage penalties that are too high will not be employed to the optimal extent by governmental enterprises nearly so often as by enterprises with better defined goals and stronger incentives for managers to attain them.

In combination, the potential for judicial decisions on official excuse from liability to overdeter even official action for which liability is at least presumptively useful (category two activity) and the possible defects in the institutional response of government to such overdeterrence indicate that courts may often be faced with the choice articulated by Learned Hand three decades ago: to deny damage liability for many official errors (intent as well as performance errors) or to risk the inducement of some new errors by a liability incentive intended to correct the errors now perceived to exist.²³⁸ Given present abilities to describe and to attain ideals for government conduct, it is extraordinarily difficult to use damage liability to fine tune official incentives so that substantially all errors imposing demonstrable harm on identifiable individuals are prevented without inducing a substantial number of opposed errors, although these may impose a less easily observed harm on a less easily identified group. Justice Rehnquist, dissenting in part in *Butz v. Economou*, scored the majority on just this point:

History will surely not condemn the Court for its effort to achieve a more finely ground product from the judicial mill, a product which would both retain the necessary ability of public officials to govern and yet assure redress to those who are the victims of official wrongs. But if such a system of redress for official wrongs was indeed capable of being achieved in practice, it surely would not have been rejected by this Court speaking through the first Mr. Justice Harlan in 1896, by this Court

²³⁷ See Letter from Robert S. Stubbs II, Executive Assistant Attorney General of Georgia (April 21, 1980); Letter from C. Tolbert Goolsby, Jr., Deputy Attorney General of South Carolina (April 22, 1980); Letter from Robert B. Littleton, Deputy Attorney General of Tennessee (April 24, 1980) (letters on file with the University of Pennsylvania Law Review).

²³⁸ *Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir. 1949), *cert. denied*, 339 U.S. 949 (1950).

speaking through the second Mr. Justice Harlan in 1959, and by Judge Learned Hand, speaking for the Court of Appeals for the Second Circuit in 1948 [*sic*]. These judges were not inexperienced neophytes who lacked the vision or the ability to define immunity doctrine to accomplish that result had they thought it possible. Nor were they obsequious toadies in their attitude toward high-ranking officials of coordinate branches of the Federal Government. But they did see with more prescience than the Court does today, that there are inevitable trade-offs in connection with any doctrine of official liability and immunity. They forthrightly accepted the possibility that an occasional failure to redress a claim of official wrongdoing would result from the doctrine of absolute immunity which they espoused viewing it as a lesser evil than the impairment of the ability of responsible public officials to govern.²³⁹

V. ENTERPRISE LIABILITY: AN ALTERNATIVE CONTROL

In parts III and IV, it was assumed that some mechanism for compensation of persons harmed by official misconduct would be available if individual officers were immune. A variety of mechanisms, other than individual officer liability, could compensate individuals for harm. Individuals could insure against the harm; government could provide an administrative vehicle for compensation, or government could pay damages pursuant to a judicial determination of liability. The last of these alternatives is examined briefly in this part and is compared to official liability as a means of controlling officials' behavior.

A. *The Mechanics of Enterprise Liability*

To the extent compensation is embraced as a goal,²⁴⁰ enterprise liability has an obvious advantage over official liability: the governmental enterprise is much more likely than the individual officer to have the funds required to satisfy a judgment.²⁴¹ The difficult question is whether the increase in compensation under enterprise

²³⁹ Butz v. Economou, 438 U.S. 478, 529 (Rehnquist, J., concurring in part and dissenting in part).

²⁴⁰ See, e.g., Carlson v. Green, 446 U.S. 14, 18-23 (1980); Scheuer v. Rhodes, 416 U.S. 232, 243 (1974).

²⁴¹ See Bermann, *supra* note 29; Davis, *supra* note 29.

liability would be accompanied by an increase or decrease in socially desirable official behavior. Two aspects of this question are addressed in this section: how does enterprise liability provide incentives to better behavior, and what impact might a change in defendant from individual to entity have on frequency of suit, the component of liability incentive least subject to judicial control?

In one sense, enterprise liability operates in exact opposition to official liability. The latter provides officers an incentive to modify their behavior (for better or for worse from society's standpoint depending on the courts' ability to provide a liability incentive of the correct quantum) except insofar as other officials act to alter that incentive (by paying for defense costs, for adverse judgments, etc.). Enterprise liability, in contrast, only provides officials an incentive to modify their behavior insofar as other officials choose to require. Put differently, where official liability acts immediately upon the officer whose conduct is at issue, enterprise liability generally acts only mediately upon that officer. He need not pay for defense of the suit nor must he pay any adverse judgment. The official in all likelihood will be required to invest some time in the suit (conferring with representatives for the defense, giving testimony, and so on) and may suffer personal embarrassment from a judgment adverse to the government based on a finding that his conduct was improper. These may, of themselves, prove significant incentives to avoid conduct that could give rise to such suits or at least to adverse judgments. By and large, however, these effects seem trivial in comparison with those triggered by official liability, where the individual's purse as well as his ego are directly at issue. The more significant deterrent effect of enterprise liability is likely to come from a restructuring of incentives within the governmental enterprise. If administrative sanctions, including shifting liability and defense costs back to the employee, requiring insurance, or disciplining the employee, are imposed against officials whose conduct generates additional costs for the government, or if additional monitoring burdens are incurred by the enterprise to prevent imposition of higher costs in defense of lawsuits and payment of damage awards, these measures are likely to provide the principal incentives to alter official behavior.

In theory, these secondary incentives from enterprise liability could result in greater deterrence than official liability, less deterrence, or the same deterrence. The general imperfection of official incentives to engage in socially valued behavior, discussed in the preceding section, precludes an assumption that enterprise liability

generally will induce the appropriate response.²⁴² If the relevant officials decide to penalize conduct that imposes defense costs on the enterprise, whether or not that conduct is found to be improper, the same possibility for overdeterrence discussed in part IV will exist. And if the administrative penalties adopted are regarded by officials as a more severe sanction than the monetary costs of the suits' defense, enterprise liability could produce a greater likelihood of overdeterrence than official liability.

While it is extremely difficult to predict what the governmental response will be in any given instance, a general pattern of underdeterrence seems a more plausible result than does overdeterrence. The initial effect of enterprise liability is the expenditure of public monies. These may come from a general fund or from an allocation to a specific bureau. Payment from a general fund requires that the initial step for altering behavior of the erring officer be taken by someone even further removed from that office than the bureau head; otherwise, the same analysis applies. If the bureau that employs the erring official provides the funds to pay for defense of lawsuits and for liability judgments, the person most immediately affected will be the head of that bureau. While each member of the bureau may suffer a reduction in bureau expenditures that benefit him personally, the whole amount of the judgment is subtracted from the funds that the bureau head has some discretion to allocate. There is considerable evidence that high-level officials are concerned about the budget for their bureaus and consistently attempt to secure larger budgets.²⁴³ Since liability expenditures in the short run reduce the amount of money available to be spent by the affected bureau, the bureau head is likely to attempt to protect his budget against liability costs. This can be done by seeking budget increases to cover liability expenses, by altering employees' behavior to reduce liability expenses, or by some combination of these actions.

Assuming that some effort will be made to reduce the bureau's liability costs, the extent of that effort will depend on the relative importance attached by the bureau head to the activity that generates liability and to the avoidance of the liability expense. The higher up an official, the greater the importance he is likely to

²⁴² See Baxter, *supra* note 29, at 51. This assumption, however, can be made for profit-maximizing firms. *Id.* But see Stone, *The Place of Enterprise Liability in the Control of Corporate Conduct*, 90 YALE L.J. 1 (1980) (arguing that some exceptions to this generally valid assumption should be recognized).

²⁴³ See generally W. NISKANEN, *supra* note 159; Posner, *The Behavior of Administrative Agencies*, 1 J. LEGAL STUD. 305 (1972).

attach to both.²⁴⁴ The chief of police, therefore, may be more concerned about reducing crime rates and about protecting the department's budget than the individual officer. Just as he loses more from a reduction in the department's budget, so, too, he gains a much greater share of the rewards that attach to achievement of the bureau's goals. If the individual police officer had systematically imbalanced institutional incentives to arrest in a nonliability world, the likely reason would be that his superior officers (and beyond them, the elected managers of government) believed the cost imposed on suspects wrongly arrested was outweighed by the benefit of a vigorous arrest policy. The court's judgment that there should be liability for the arrest indicates a different evaluation of these costs than is arrived at through the processes of the other two branches. To the extent officials in the other branches disagree, they may be willing to tolerate some level of liability costs in order to prevent interference with the underlying activity.²⁴⁵ Assuming that the court has identified the socially correct performance standard, then, the same incentives that caused managers and their employees to deviate from the social optimum in a world without liability would cause them to underdeter official errors when enterprise liability (but not officer liability) is imposed.

In assessing the likely response to enterprise liability, however, any extrapolation from a nonliability world must be made with considerable reticence. One reason that enterprise liability probably will alter officials' incentives is that the group burdened by departure from the socially desirable may well change—the group harmed by too many arrests, for example, is not coextensive with the group of taxpayers who must pay liability judgments against the enterprise. In a nonliability world, the arrestees bear the cost of suboptimal official conduct. In an enterprise liability world, the arrestees (theoretically) will be fully compensated for the harm imposed on them, and the cost of suboptimal conduct will shift to taxpayers. If the latter group has fewer impediments than the former to communicating with government's managers and to re-

²⁴⁴ See Alchian & Demsetz, *supra* note 205; Fama, *supra* note 27; Jensen & Meckling, *supra* note 27. Although "superiors" will be aware of the divergence between group interests and personal interests of individual subordinates, and will take steps to reduce its impact, see Fama, *supra* note 27, the additional costs necessary to reduce the effect of divergent interests means that, after all efficient adjustments have been made, lower-echelon employees still would have interests farther from the joint or social interest than higher-ranking persons.

²⁴⁵ For a discussion of the different notions of social value likely from the judicial and other branches, see Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279 (1957).

warding them for acting in a manner consistent with the group's wishes, it is reasonable to expect an increased effort by government's managers to reduce the arresting activity that courts consider undesirable once liability is imposed.

While the imposition of liability on the enterprise thus should lead to changes in the behavior of government's managers, two caveats are in order. First, if the monetary costs of liability are spread over a large number of taxpayers, causing only a very slight increase in the tax burden on each, any incentive to ascertain the cause of the increase and to take steps to limit it may for most taxpayers be less than the cost of doing so.²⁴⁶ Again, the problem of high transaction costs for diffuse groups with low individual interest prevents the translation of a substantial group interest into equally substantial incentives for government's managers.²⁴⁷ Second, the structure of government makes the translation of incentives faced by higher-level officials into similar incentives for lower-level officials difficult. As elaborated in part IV, the translation occurs, but frequently something is lost in the translation.²⁴⁸ Given positive costs to restructuring official incentives, it probably is unrealistic to expect an adjustment of each individual official's incentives that fully reflects the enterprise liability costs his actions generate.²⁴⁹ A reasonable guess, then, is that, whereas officer liability may lead to overdeterrence, enterprise liability will result in underdeterrence, but not in so much underdeterrence as prevails in the absence of any liability.

If, as posited above, liability results in some underdeterrence of official misconduct, and official liability results in overdeterrence, which is to be preferred? Although the basis of choosing between them is slim, there is one reason to believe that the level of underdeterrence from enterprise liability may be less than the overdeterrence possible with official liability. The signal provided to other officials by misconduct that results in enterprise liability is a clear one: the judicial process has valued the harm from what it has identified as misconduct at a specific dollar amount. In contrast,

²⁴⁶ See J. BUCHANAN & G. TULLOCK, *supra* note 131, at 143-44; Stigler, *supra* note 125, at 10-12.

²⁴⁷ See authorities cited in notes 214-16 *supra*.

²⁴⁸ See text accompanying notes 221-37 *supra*.

²⁴⁹ Cf. *City of Newport v. Facts Concerts, Inc.*, 101 S. Ct. 2748, 2759-62 (1981) (questioning the deterrent value of enterprise liability and, in part on that basis, immunizing municipalities from punitive damages in § 1983 suits).

the signal to other officials that an officer has engaged in socially undesirable conduct that avoids some risk of liability is much less clear.²⁵⁰ Because underdeterrence of official errors will result in official misbehavior that yields too much liability, and overdeterrence will produce official misbehavior that yields too little liability, enterprise liability may produce better incentives for officials than officer liability, as well as more compensation to persons harmed by official action.

Yet, even this modest conclusion must be qualified. The greater capacity for compensation may induce some suits against the enterprise that would not have been brought against the less pecunious individual officer. To know whether suits will be brought with more frequency under one rule than under the other would require evaluation of the number of nonmeritorious "spite" suits filed against individual officers, the number of meritorious suits not filed against judgment-proof officials, and the number of nonmeritorious "deep pocket" suits filed against enterprises. This last class of suits might seem small because, by hypothesis, the plaintiffs who are motivated by monetary rather than other personal considerations should be deterred from suit except where there is at least an even probability that the award will merit the cost of suit. The costliness of litigation, however, may induce an entity that frequently is subject to suit to adopt a practice of overcompensatory settlement of small claims.²⁵¹ Such a practice might prompt an increase in the number of such claims filed. It therefore is difficult to predict what the relative frequency of suit under these alternative liability schemes would be. Indeed, there may be too much litigation under either scheme. Still, if the likely bias of official liability is to overdeter and that of enterprise liability is to underdeter, too great a frequency of suit (although of itself a misallocation of resources) would exacerbate the problem with official liability's impact on officer's incentives and ameliorate the problem presented by enterprise liability. Granting the difficulty of assessing these various effects on official conduct, where official actions are likely to trigger a significant number of spite suits or where the imbalance in official incentives is slight, enterprise liability may entail a lower risk than official liability of substituting incentives to commit one official error with incentives to commit another.

²⁵⁰ Cf. Holmstrom, *supra* note 205, at 83-89 (discussing the notion of a valuable signal and the value of imperfect information).

²⁵¹ See H. Ross, *supra* note 195, at 233-43; Bombaugh, *supra* note 196, at 214.

B. *Toward Enterprise Liability: Proposed Steps*

If enterprise liability might be preferable to official liability, how can the transition from individual to institutional liability be effected? The story of judicial decisions respecting official excuse from liability presented in part II reflects an expansion of liability for some officers that may in part have been justified by the absence of enterprise liability. Yet even as official immunity has been narrowed for these officials, liability for governmental enterprises has expanded. To a significant extent, sovereign immunity from suit now has been abrogated at both the federal and state levels.²⁵² Moreover, municipalities may now be sued directly under 42 U.S.C. § 1983,²⁵³ the principal vehicle for damage suits against public officers. It is not entirely clear what the scope of municipal liability under section 1983 will be. The Court has declared that cities will not be vicariously liable for official misconduct not sanctioned by official policy.²⁵⁴ At the same time, when conduct is found to have been sanctioned by officials of sufficient rank to trigger liability, the municipalities will not benefit from the qualified immunity defense available to officials.²⁵⁵ One possible result of these decisions could be to leave low-level officers liable for their mistakes, subject to the qualified immunity defense, while making cities absolutely liable for errors of high-level officers. If the Court adheres to its decision that the availability of enterprise liability does not abrogate official liability,²⁵⁶ that would provide plaintiffs the option of pursuing the officer or the enterprise for misconduct by higher-level officials—the very ones who are more likely to have relatively balanced incentives and for whose acts liability thus is less likely to be socially beneficial.

It may be that the difficulty of determining when an official's improper action will be attributed to the municipality will move municipal enterprise liability under section 1983 in the direction

²⁵² See, e.g., Federal Tort Claims Act, ch. 753, tit. IV, 60 Stat. 842 (1946) (codified in scattered sections of 28 U.S.C.); S. SATO & A. VAN ALSTYNE, *STATE AND LOCAL GOVERNMENT LAW* 725, 728 (1977). See also Wolcher, *Sovereign Immunity and the Supremacy Clause: Damages Against States in Their Own Courts for Constitutional Violations*, 69 CALIF. L. REV. 189, 239 & n.214 (1981).

²⁵³ 42 U.S.C. § 1983 (1976). See *Monell v. Department of Social Services*, 436 U.S. 658 (1978), *rev'g in part* *Monroe v. Pape*, 365 U.S. 167 (1961).

²⁵⁴ *Monell v. Department of Social Services*, 436 U.S. 658, 691-95 (1978). Nor are municipalities liable for punitive damages in § 1983 suits. *City of Newport v. Facts Concerts, Inc.*, 101 S. Ct. 2748 (1981).

²⁵⁵ *Owen v. City of Independence*, 445 U.S. 622 (1980). Justice Powell in dissent observed that cities had gone from absolute immunity to absolute liability in only two years. *Id.* 664-65 (Powell, J., dissenting).

²⁵⁶ *Carlson v. Green*, 446 U.S. 14 (1980).

of official liability, and not in the direction of a second remedy for officials whose nonliability incentives are more closely analogous to category three than category two. If this route is taken, two more steps would substantially complete a transition to enterprise liability: congressional action, under the authority of section five of the fourteenth amendment,²⁵⁷ to extend section 1983 to suits directly against the states,²⁵⁸ and construction of section 1983 and related damage remedies as not authorizing damage actions against officials when the governmental enterprise is available as a defendant. Each step requires a brief comment.

The extension of section 1983 to suits against a state, absent the state's consent, presents a conflict with the eleventh amendment. Although that amendment bars only the exercise of federal judicial power over suits against a state by citizens of another state or nation,²⁵⁹ the Court long ago construed it also to bar suits in federal court against a state by one of its own citizens.²⁶⁰ While the amendment as written would present only a minor impediment to a shift to enterprise liability, the current judicial interpretation of the amendment constitutes a serious impediment. To an extent, innovative judicial decisionmaking, finding waivers of sovereign immunity in surprising ways,²⁶¹ has reduced the importance of this judicial gloss. Nonetheless, a reversal of the decisions expanding the eleventh amendment would be a simple means of resolving this difficulty. To one who finds the argument for reading the amendment to mean what it does not say unconvincing, this course would produce collateral benefits by simplifying the law of federal jurisdiction.²⁶²

²⁵⁷ U.S. CONST. amend. XIV, § 5 provides: "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

²⁵⁸ A recent effort to reach this result was unsuccessful. See Civil Rights Improvement Act of 1979, S. 1983, 96th Cong., 1st Sess., 125 CONG. REC. S15,994 (daily ed. Nov. 6, 1979). See generally Field, *The Eleventh Amendment and Other Sovereign Immunity Doctrines: Congressional Imposition of Suit Upon the States*, 126 U. PA. L. REV. 1203 (1978).

²⁵⁹ U.S. CONST. amend. XI provides: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

²⁶⁰ See, e.g., *Hans v. Louisiana*, 134 U.S. 1 (1890).

²⁶¹ See, e.g., *Parden v. Terminal Ry.*, 377 U.S. 184 (1964). But see *Edelman v. Jordan*, 415 U.S. 651 (1974).

²⁶² The case for reversing *Hans* is made in considerably greater detail in Engdahl, *supra* note 29, at 60-67. See also Wolcher, *supra* note 195 (arguing that eleventh amendment restraints should be avoided by mandating state court entertainment of claims not cognizable in federal courts).

The judicial construction of section 1983 noted here as a possible second step in the transition to enterprise liability, however, would seem at once a step toward less straightforward interpretation of that statute. That would not, of course, be the case if Congress included that interpretation in the text of the statute. Yet, even if Congress did not go so far, reading section 1983 to preclude suits against individual officers where the governmental entity is suable hardly can be thought to do more violence to the text of section 1983 than the Court has done already. Section 1983 declares that "every person" who, under color of state law, deprives another person of federally secured protections "shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding."²⁶³ The Court has held that actions at law are, as a rule, not suitable proceedings when instituted against judges or legislators²⁶⁴ and further has suggested that for some acts by these officials, no other proceeding is proper.²⁶⁵ Moreover, the Court has interpreted the language of section 1983 to provide for liability of non-immune officials only if they have acted in bad faith or beyond the pale of reasonably authorized conduct.²⁶⁶ Finally, as noted above, the Court has declared the word "person" to include municipalities.²⁶⁷

It quickly should be granted that the statute is not a model of clarity and its history is a fertile source of argument but not of elucidation.²⁶⁸ The point is not that the Court has gone astray in its reading of section 1983, but rather that the interpretation suggested here, refusing to hold officials personally liable for dam-

²⁶³ Section 1983 (1976) reads in full:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983 (1976).

²⁶⁴ *Stump v. Sparkman*, 435 U.S. 349 (1978); *Pierson v. Ray*, 386 U.S. 547, 553-55 (1967); *Tenney v. Brandhove*, 341 U.S. 367 (1951).

²⁶⁵ *Supreme Court of Virginia v. Consumers Union*, 446 U.S. 719 (1980); *Eastland v. United States Servicemen's Fund*, 421 U.S. 491 (1975).

²⁶⁶ *E.g.*, *Procunier v. Navarette*, 434 U.S. 555 (1978); *O'Connor v. Donaldson*, 422 U.S. 563 (1975).

²⁶⁷ See note 253 *supra*.

²⁶⁸ See, *e.g.*, majority and dissenting opinions in *Owen v. City of Independence*, 445 U.S. 622 (1980); *Pierson v. Ray*, 386 U.S. 547 (1967); *Monroe v. Pape*, 365 U.S. 167 (1961); *Tenney v. Brandhove*, 341 U.S. 367 (1951).

ages where the state is available as a defendant, is at least as consistent with the text as is the current construction. The Court has opted to try to reach sensible results in section 1983 litigation rather than attempt truly to divine the intent of that statute's drafters. Any attempt at the latter course is an exercise in frustration. Even at the most basic level, questions concerning section 1983's meaning and purpose are unclear.²⁶⁹ Was the statute intended to provide a federal forum for ordinary state remedies so as to assure equal protection of the laws to groups that might not receive evenhanded treatment in state courts?²⁷⁰ Or was it intended to provide a federal remedy for which there was no state analogue?²⁷¹ Whatever the purpose of section 1983, the Court has sought to harmonize protection of federal interests (including the interest against certain state-sanctioned discriminations) with the states' concerns over effective government.²⁷² By barring actions against individuals when a state or municipality can be sued, that task will be better accomplished.²⁷³

This interpretation of section 1983 would not bar states from recovering over against state officers. If states or their subdivisions believe that this course is a useful supplement to other devices for constraining employees' behavior, there is little reason for courts to distrust that judgment. Because the governmental enterprise must take an affirmative act to reach this result, it should not be expected generally to err in the direction of passing on too much of the liability burden to individual officers.²⁷⁴

In addition to providing a better framework for adjudicating liability for government actions at the state and local levels, this

²⁶⁹ See Shapo, *Constitutional Tort: Monroe v. Pape and the Frontiers Beyond*, 60 NW. U.L. REV. 277, 279-82 (1965); *Developments in the Law—Section 1983 and Federalism*, 90 HARV. L. REV. 1133, 1141-56 (1977).

²⁷⁰ See, e.g., *Owen v. City of Independence*, 445 U.S. 622, 654-56 (1980); *Pierson v. Ray*, 386 U.S. 547, 563-64 (1967) (Douglas, J., dissenting); Schnapper, *Civil Rights Litigation After Monell*, 79 COLUM. L. REV. 213, 243-44 (1979).

²⁷¹ See, e.g., *Monroe v. Pape*, 365 U.S. 167, 237-43 (1961) (Frankfurter, J., dissenting); Newman, *supra* note 29, at 447-51; Schnapper, *supra* note 270, at 244-45.

²⁷² See, e.g., *Butz v. Economou*, 438 U.S. 478, 497, 508-14 (1978); *Scheuer v. Rhodes*, 416 U.S. 232, 240-42 (1974).

²⁷³ Insofar as it is feared that states might be willing to pay the price of damage judgments in order to continue popular, if unconstitutional, discriminations, a fear that seems reasonable in light of states' reactions to desegregation decisions, it should be noted that both injunctive relief and criminal penalties would continue to be available tools for combating undesirable behavior by state officials. See 18 U.S.C. §§ 241, 242, 245 (1976); 42 U.S.C. § 1983 (1976).

²⁷⁴ See text accompanying notes 231-37 *supra*.

interpretation of section 1983 could be expected to benefit the federal establishment. Supreme Court decisions respecting liability of federal officials over the past decade have embodied the view that, when federal rights are at issue, it is only fitting that enforcement of those rights against the federal government be no less zealous than enforcement against the states. This view was plainly expressed in *Butz v. Economou*²⁷⁵ to justify substitution of the qualified immunity test where absolute immunity had theretofore applied. So too, this view appears in decisions, such as the delightfully titled *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*,²⁷⁶ which infer rights of action against federal officers directly from the Constitution. In recently holding that such rights of action can be implied against officers even where statutory damage remedies against the United States are available, the Court again was simply paralleling the course of liability for state officials.²⁷⁷ The distinctions between the position—practical and legal—of state and federal officers may well militate against this sort of parallelism. But if the Court followed this pattern by restricting suits against federal officers where alternative remedies are available, a result parallel to the proposed reading of section 1983, it might increase the likelihood that damage suits would improve rather than diminish those officials' incentives to behave in a socially desirable manner.

C. Continuing Issues: Lines, Limits and Standards

The proposals discussed in the last section, of course, do not resolve all issues pertaining to governmental liability. Three remaining issues are touched on in this section.

Abrogating official liability in favor of enterprise liability cannot be accomplished by a simple rule that no government official is personally liable for any act. Plainly there are some activities, engaged in by officials, that need no special protection.²⁷⁸ A congressman out shopping one Saturday drives his family car into the rear of another vehicle. His activity is in no way different from that of any other driver. There is no reason to believe that the liability rules constraining other drivers' incentives to behave de-

²⁷⁵ 438 U.S. 478, 500-01 (1978).

²⁷⁶ 403 U.S. 388, 395-97 (1971). See also *Carlson v. Green*, 446 U.S. 14 (1980); *Davis v. Passman*, 442 U.S. 228, 248 (1979).

²⁷⁷ E.g., *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971).

²⁷⁸ See Epstein, *supra* note 29, at 57-58.

sirably and allocating financial responsibility for injury are less effective for a congressman than for a businessman. The off-duty policeman who in the course of an argument shoots someone similarly merits no special immunity.

In drawing the line between official behavior, which should be immune from private damage liability, and "personal" behavior by an official, which should not, the appropriate question is whether the official was in the situation that generated the challenged action by virtue of his governmental position. Even where the congressman's accident takes place on the way to his office or the policeman's gun is issued by his department, this question must be answered in the negative.²⁷⁹ The official connection to driving or to owning and carrying a gun is not significant to these situations. Once it is acknowledged, however, that the official found himself in the situation from which his act arose because he was a government officer, the degree to which he strayed from the duties of his office should not be an issue. *Stump v. Sparkman* was rightly decided on this point, for once the degree of departure from actual authority becomes an issue in drawing the line between immunity and liability, immunity effectively is lost, even where liability is denied.²⁸⁰

A second issue that will continue to pose difficulties for courts relates to limiting the situations in which recovery may be had against the enterprise given that the individual is immune. There are some governmental actions for which enterprise liability as well as official liability is undesirable.²⁸¹ Should the United States, for instance, be held answerable in damages to persons injured in a military invasion if the government was negligent in planning or implementing the invasion? Should the government be liable if it

²⁷⁹ Two cases presenting similar issues reveal the different judicial resolutions of such matters. In *McCrink v. City of New York*, 296 N.Y. 99, 71 N.E.2d 419 (1947), the city was held liable when an off-duty policeman shot and killed another, though the shooting was not in connection with an attempt to halt a crime or apprehend a suspect. The department's rule that police carry guns off duty was held to be sufficient involvement by the governmental enterprise. In *Lopez v. Vanderwater*, 620 F.2d 1229 (7th Cir.), cert. dismissed, 101 S. Ct. 601 (1980), the court held that a judge lacked judicial or prosecutorial immunity for some, but not all, conduct that originated outside the scope of his office. The judge discovered plaintiff near a building in which the judge had a financial interest, held plaintiff at gunpoint, turned him over to police, secured a business partner's signature on a complaint form, processed the case as though defendant had pleaded guilty, and entered a conviction and sentence. Liability was found for the unauthorized prosecution. See also *Rankin v. Howard*, 633 F.2d 844 (9th Cir. 1980), cert. denied, 49 U.S.L.W. 3806 (U.S. Apr. 28, 1981) (No. 80-1559).

²⁸⁰ *Stump v. Sparkman*, 435 U.S. 349, 362-64 (1978).

²⁸¹ See *Baxter*, *supra* note 29, at 51.

can be shown that the President knew that invasion through another geographic route would cost fewer lives? There is an intuitive reaction against liability, indeed against judicial reviewability, where such decisions are at issue. The distinction between governmental and proprietary activity, sometimes used to express this thought,²⁸² does not capture the objection to liability for poor wartime planning. Operation of a police force is a classic governmental activity, yet enterprise liability for police errors probably will be beneficial and judicial review of police conduct has rarely been thought inappropriate.

At bottom, the distinction is that addressed in part III. For some official activities, we trust officials to have relatively good, if still imperfect, incentives to act in a socially desirable fashion, because people with opposed interests have been about equally effective in rewarding officials decisions, and because institutional or other considerations guarantee a serious, as well as balanced, effort by the official to perform his assigned task. At the same time, these category three and four activities are most costly to evaluate. Devices other than liability, thus, seem appropriate guarantors of socially desirable conduct. More precisely, even though we do not all agree on what such conduct is and have difficulty assessing whether it has been achieved, which together make us uneasy over our ability to secure official action that a consensus would find optimal, liability for category three and four activities does not sufficiently improve official incentives to merit its cost. That point holds whether official or enterprise liability is at issue.²⁸³ The difference is that enterprise liability promises a possible advantage in adjusting to liability incentives that are too great—because the activity at issue more appropriately belonged to category three or four than category two; because the courts failed to take account of the liability incentive generated by unsuccessful suits, or because, frequency of suit aside, the expected damage penalty is set too high.

A related problem to that of ascertaining limits to enterprise liability is the determination of the appropriate standard for such liability.²⁸⁴ Should the enterprise be held liable whenever an official exceeds his authority? Or should there be a range of toler-

²⁸² See, e.g., Epstein, *supra* note 29, at 56-60; Mashaw, *supra* note 29, at 10-14.

²⁸³ See, e.g., Reynolds, *The Discretionary Function Exception of the Federal Tort Claims Act*, 57 GEO. L.J. 81, 114-18 (1968).

²⁸⁴ See Epstein, *supra* note 29, at 52-53.

able performance errors for which damage penalties should be denied? These issues are not easily resolved and extended treatment here would considerably enlarge the scope of this undertaking. The observation relevant to the focus of this article is simply that a shift from official liability to enterprise liability, while it does not eliminate these issues, does not make their resolution any more onerous than at present. The courts' task in addressing enterprise and official liability alike is to advance officials' incentives at once to adhere to the statutory and constitutional limitations on their conduct and to promote public benefits from that conduct. The burden of the discussion here is not that this task is easily carried out, but that it might more easily be achieved with enterprise than with personal damage liability.

VI. CONCLUSION

The law of official liability fashioned by the Supreme Court, especially insofar as it removes the bar of absolute immunity to suits against high-level executive officials and gives all executive officers a defense of good faith and reasonable cause to believe their acts lawful, probably provides too much opportunity for adversely affecting official behavior while only rarely granting damage awards to plaintiffs. Together with standards for assessing liability and measuring damages, the decisions respecting the immunity defense help shape incentives governing official behavior. The expected damage penalty that emerges from these rules may seem appropriate, but if the effect of litigation that does not result in damage awards is taken into account, the penalty is likely now to be too great. This is especially true for officials who exercise authority directly and visibly against individuals who can institute legal actions at low cost.

Although these officials often may be ones whose authority we are anxious to constrain—because it is coercive and has the potential to impose considerable cost on the individuals subject to it—official damage liability is a poor device to effect that constraint. Nearly all government action has a range of effects on a variety of people, giving individuals strikingly different interests in the way officials should behave. The very same differences in interests that make it difficult to define good government behavior and to give officials at the outset incentives to engage in such behavior—in sum, the reasons one might want to hold officials liable—make it difficult to assess when officials should be liable and more difficult yet to assure

that liability increases the likelihood of good behavior. Given the difficulty of policing official action, one response to a too high expected damage penalty will be undesirable official action that reduces the probability of suit.

A better, if still imperfect, mechanism for securing appropriate official behavior may be to hold the governmental enterprise, rather than the individual officer, liable for improper official conduct. Enterprise liability simultaneously will secure greater opportunity for compensation of meritorious plaintiffs. The transition to enterprise liability need not be difficult. Relatively simple steps by Congress and by the courts could accomplish the task. Even absent congressional action, the courts could limit some potential ill effects of current rules by granting officials immunity from personal liability where a governmental entity is suable instead. In all events, the Court would do well to reconsider a series of decisions that appear to have encouraged a torrent of litigation from which a steady stream of trials yields but a trickle of recovery.